Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

FLORA HOLLAND, WARDEN,

Petitioner,

v.

JESSIE L. JACKSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Does a federal court exceed its authority to grant the writ of habeas corpus under 28 U.S.C. §2254(d) when, in determining whether a state court decision involved an unreasonable application of United States Supreme Court precedent, the federal court considers "evidence" never presented in the state court proceeding and, based upon that "evidence," finds that the state court unreasonably applied the governing legal principal to the facts of the prisoner's case?

II.

When a state court decision cites the correct standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), to be applied to a state prisoner's ineffective assistance of counsel claim, does the state court's use of a shorthand term for that standard in its discussion of the issue, which, when considered in isolation, may be interpreted as stating an incorrect standard, render the state court decision "contrary to" United States Supreme Court precedent?

STATEMENT OF INTERESTED PARTIES

All parties to this case are named in the caption. No party to this petition is a non-governmental corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court.

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PETITION FOR WRIT OF CERTIORARI

The Office of the Attorney General of Tennessee, on behalf of Flora Holland, Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals, *Jackson v. Holland*, No. 01-5720, 80 Fed. Appx. 392, 2003 WL 22000285 (6th Cir. 2003), is unreported. (App. 1) The memorandum opinion of the district court denying Jackson's petition for writ of habeas corpus (App. 38) is unreported. The opinion of the Tennessee Court of Criminal Appeals finding no ineffective assistance of counsel at Jackson's criminal trial and denying his petition for post-conviction relief, *Jackson v. State*, No. 01C01-9412-CR-00427, 1995 WL 747843 (Tenn. Crim. App. Dec. 19, 1995), is unreported. (App. 77)

JURISDICTION

The judgment and opinion of the court of appeals were entered on August 21, 2003. (App. 1). Petitioner's timely request for rehearing was denied on November 21, 2003. (App. 103). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §2254(d)(1), provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

STATEMENT OF THE CASE

I. Procedural History

In 1987, respondent Jessie L. Jackson ("respondent" or "Jackson") was convicted by a jury in the Criminal Court of Davidson County, Tennessee, of first-degree murder and sentenced to life imprisonment. Jackson filed a notice of appeal from his conviction and sentence, but that appeal was subsequently dismissed at Jackson's request. In 1989, Jackson filed a petition for post-conviction relief, in which he alleged, among several claims, that he received ineffective assistance of counsel at

his criminal trial. Following an evidentiary hearing on Jackson's ineffective assistance of counsel claim, the Davidson County Criminal Court entered an order denying post-conviction relief. The Tennessee Court of Criminal Appeals affirmed the criminal court's judgment on December 19, 1995 (App. 77), and the Tennessee Supreme Court denied Jackson's application for permission to appeal.

In March 1997, Jackson filed a second petition for post-conviction relief, which was summarily dismissed by the criminal court as being time-barred under Tenn. Code Ann. §40-30-102 (1990 Repl.) (repealed 1995). The Tennessee Court of Criminal Appeals affirmed the dismissal in an opinion filed October 19, 1998 (App. 99), and the Tennessee Supreme Court denied Jackson's application for permission to appeal.

On April 23, 1997, while his second post-conviction proceeding was still pending in the state courts, Jackson filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Tennessee. The district court granted the warden's motion for summary judgment and dismissed Jackson's petition. (App. 38)

In a decision filed August 21, 2003, the United States Court of Appeals for the Sixth Circuit reversed the judgment and remanded the case to the district court, concluding that the Tennessee Court of Criminal Appeals "both applied a burden of proof contrary to the burden articulated in *Strickland* and unreasonably applied *Strickland*'s holding to Jackson's [ineffective assistance] claim." (App. 35). The Sixth Circuit denied Warden Holland's petition for rehearing on November 21, 2003 (App. 103), and, thereafter, denied the warden's timely request to stay the

mandate pending the filing of a petition for writ of certiorari in this Court.

II. Facts Relevant to the Petition

1. The proof at Jackson's criminal trial is summarized in the Tennessee Court of Criminal Appeals' decision in Jackson's first state post-conviction appeal. *Jackson v. State*, No. 01C01-9412-CR-00427, 1995 WL 747843 (Tenn. Crim. App. Dec. 19, 1995) (app. denied June 10, 1996) (App. 77).

> On February 2, 1986, Sharon Bryant and her boyfriend, the victim James Crawley, hosted a party at the apartment they shared at the University Court housing project in Nashville, Tennessee. The purpose of the party was to raise money via a card game called "Tonk." The victim needed the money for car repairs. Numerous people had been invited to the party, including the defendant, who was a friend of the victim.
>
> The party was already in progress when the defendant arrived with the victim at some time between 9:00 and 10:45 p.m. After arriving, the defendant alternated between playing cards and going upstairs with the victim. Ms. Bryant testified that she had heard arguing the last time the defendant was upstairs with the victim, and that she had told them to come back downstairs. When they did, the defendant resumed playing cards. Bryant also testified that the defendant and the victim had both been "high." The defendant denied that he had been arguing with the victim.
>
> After the defendant had resumed playing cards, three more male guests arrived and wanted to play dice. The victim then left, telling Bryant that he was going to get some dice. He also told her, "I have the money to get my car fixed," and patted one of his pockets. The defendant testified that the real reason the victim left was to sell some cocaine. Bryant testified that if the victim had had the money, it had come from some source other than the card game. Shortly thereafter, the defendant asked Bryant where the victim had gone. She told him that he had gone to get some dice. The defendant then left, leaving some money on the card table. A few minutes later, the victim's cousin came by and told Bryant that her boyfriend had been shot.
>
> The victim's body was lying in front of a long, rectangular apartment building in University Court. The building was located on a corner, with its long side facing one street and running parallel with it ("A Street"), and running perpendicular to the intersecting street ("B Street"). The victim had been shot in the front of the far end of the building, looking down A Street from the corner. This building was several buildings away from the one in which Bryant's apartment was located. There was testimony that the area where the victim was shot was known for quick and numerous drug transactions. There was a streetlight nearby.
>
> Bryant testified that on arriving at the place where her boyfriend was lying, she had seen the victim's aunt, Freddie Davis, Jonathan Hughes and "another guy" there. Then numerous people arrived. She testified that the defendant had arrived at about the same time as the ambulance. At that point, she testified, the defendant had tried to comfort her. She further testified that she had spoken with the defendant after she got

back from the hospital and that he had mumbled something that she thought was, "I didn't mean to do it." She testified that when she had questioned him about this, he said, "They didn't have to do it. They didn't have to kill him. He was too little to get shot. They could have beat him up." She testified that she had then asked him who did it, and he had replied, "They said, Frankenberry did it" and "you know they got into an argument," to which she had replied, "I heard." Bryant also testified that later in the evening she had asked the defendant if the victim had been killed over drugs or money and that he had replied, "No, [it] wasn't about drugs and it wasn't about any money." She had then asked what it was about and he replied, "I'm too upset. I can't talk. I'll come back tomorrow and tell you." Bryant testified that the defendant had not later explained why the victim had been shot, but did deny shooting him.

Jonathan Hughes testified that he had been sitting on a car parked along B Street when he saw the victim walking down the sidewalk. Hughes testified that the defendant had been walking down the street behind the victim, telling him to "Come here and let me holler at you for a minute." Hughes testified that the victim had responded that he didn't have time, he was looking for his money. According to Hughes, the defendant had continued to follow the victim. Paul Ray Jones, Hughes' cousin, testified that he had been with Hughes and had also seen the defendant and the victim walking down the street.

Hughes testified that Jones had then told him that his girlfriend, Melissa Gooch, wanted to talk to him. At this, Hughes had started down B Street to meet his girlfriend, walking on the opposite

sidewalk and somewhat behind the victim and the defendant, but going in the same direction. A short distance later, where B Street intersected A Street, Hughes testified that he and his girlfriend had turned left while the defendant and the victim turned right. He further testified that he and Gooch had then heard two shots, at which they turned around, looked up A Street, and saw the defendant fire two shots at the victim. Hughes testified that he had then seen the defendant bend down, roll the victim over, and run around the far corner of the building. Hughes testified that he had then gone to where the victim was lying, arriving there after ten or fifteen others had.

Two other witnesses testified that they had seen the defendant running at some distance from the body, and that he had been trying to hide his face behind his jacket. These sightings were immediately after the shooting, at about 12:30 a.m. The defendant denied taking any such actions.

Melissa Gooch was not called to testify by either the defendant or the State.

The defendant denied shooting the victim. He testified that he and the victim had not had an argument that night and that the victim was trying to sell some cocaine. He testified that he had brought a small amount of cocaine to the party as a gift to the host and hostess, but that the victim had wanted to add it to some cocaine he already had and sell the entire amount to a third party. The defendant testified that he had been agreeable to this so long as the victim repaid him a previous ten dollar ($10) loan out of the proceeds. The victim was reluctant to do this because he needed the money for his car.

The defendant testified that he had left the party because two of the three newcomers had "appeared to be gangster[s]," so he had gone to his pickup truck to get his pistol for protection. On the way back to the apartment from his truck, the defendant testified, he had met the same three men who then told him that the victim had been shot. At that point, the defendant testified, he had walked down to the murder scene, hiding his pistol under a fence on the way. The defendant denied that he had been on the street where Hughes claimed to have seen him.

Freddie Davis testified that he had been walking from his mother's apartment to his sister's apartment when he saw the victim, and someone else he couldn't identify walk up to a brown and beige car on A Street. Davis testified that "they was talking for a minute and then the next thing I know the dude just come out of his car and just started shooting." Davis testified that he had then run to his sister's apartment to tell her, and had then gone down to where the victim was lying. The angle of Mr. Davis' view was approximately perpendicular to that of Hughes but, from a review of the exhibits, the jury could reasonably have concluded that the distance of each witness from the scene of the shooting was roughly about the same. Davis testified that the car had taken off and that he was with the victim when he died. Davis also testified that "everybody [had been] saying that Frankenberry had shot" the victim. Davis reported this information to the police, who then put a "pick-up" out on the vehicle. Detective Wynn testified that they had investigated a car that matched the description given and had tried to develop information on a Frankenberry, but that they had not come up

with any other indication that Frankenberry had been involved, and had not tied the vehicle to the crime.

Davis also testified that he had not seen Jonathan Hughes at the scene and that the other person who had been with the victim when he was shot had run off. Davis testified that this person had been wearing blue jeans and a gray jacket. The defendant had been wearing red pants on the night on question. Davis admitted on cross-examination that he had drunk two to four half-pints that night prior to the shooting.

The victim had been shot with a .25 caliber gun and three .25 caliber bullets were recovered from his body. The murder weapon was never found. However, John Crawford testified that he had seen the defendant pull a pistol out from under a car seat nine to ten months before the shooting and that, although he could only see a portion of the pistol because the defendant had had it "cuffed up," he thought it was a .25 caliber pistol. Terry Merrill testified that, after the shooting, he had seen the defendant retrieve a gun from under a fence between two buildings and put it in his pants. The defendant testified that this had been the .22 caliber pistol that he had hidden after learning of the victim's death. The defendant testified that he had never had a .25 caliber gun.

Jackson v. State, *supra*, slip op. at 2-7 (App. 78-84)

2. In his first post-conviction petition, Jackson contended that his defense attorney was ineffective, *inter alia*, for failing to interview several witnesses before trial. The state court conducted an evidentiary hearing on Jackson's claims over two different days in July 1990 and May 1991 and, on July 28, 1994, entered an order denying

post-conviction relief. Jackson filed a notice of appeal from the court's denial of his post-conviction petition on August 8, 1994.

On the same date, Jackson filed a pleading styled "Motion for Hearing in Nature of Motion for New Trial." In the motion, Jackson asserted that a "missing witness, Melissa Gooch, [who] has only recently been found in this case," would testify that, contrary to Hughes' testimony at trial, she was not with him on the night in question. No affidavit from Gooch was filed, and the criminal court summarily dismissed the motion one week later.

On appeal to the Tennessee Court of Criminal Appeals, Jackson alleged that the lower court erred both in its denial of his ineffective assistance of counsel claim and in refusing to reopen proof to consider the testimony of Melissa Gooch. With regard to reopening the proof, the Court of Criminal Appeals rejected Jackson's argument on two fronts. First, the court noted that the name of Jackson's alleged "missing witness" was known to him at the time of trial through the testimony of Jonathan Hughes. "The defendant did timely file a motion for new trial, which was denied after a hearing. The defendant does not get two bites at this particular apple." (App. 87) Second, the court ruled that, even if Jackson's "novel pleading" were construed as a petition for writ of error coram nobis,[1]

[1] Under Tennessee law, upon a showing that the defendant was without fault in failing to present certain evidence at his original criminal trial, "a writ of error coram nobis will lie for subsequently or newly discovered evidence ... if the judge determines that such evidence may have resulted in a different judgment, had it been presented at trial." Tenn. Code Ann. §40-26-105 (2003). The one-year statute of limitations prescribed by Tenn. Code Ann. §27-7-103 for

(Continued on following page)

it was barred by the one-year statute of limitations under Tenn. Code Ann. §27-7-103, since Jackson's pleading was filed "more than seven years after his conviction and more than six years after he dismissed his appeal." (App. 87) Further still, the court ruled that, even if the pleading had been timely filed, Jackson failed to satisfy the procedural requirements of a petition for writ of error coram nobis, because "no affidavit of Melissa Gooch was ever filed in this matter," and Jackson failed to provide a satisfactory reason for failing to locate Gooch in the years preceding his motion. (App. 88)

As to Jackson's ineffective assistance of counsel claim, the Court of Criminal Appeals first quoted the appropriate standard to be applied from *Strickland v. Washington*, 466 U.S. 668 (1984), then addressed the issue in a manner approved by this Court in *Strickland* by determining the issue of prejudice without specifically determining whether trial counsel's performance was deficient. Although Jackson faulted defense counsel for failing to call certain witnesses, particularly Melissa Gooch, to impeach the State's key eyewitness, Jonathan Hughes, the state court found "not a shred of evidence introduced on either day of the bifurcated post-petition [sic] hearing" that could have been used to impeach Hughes:

> The only impeachment "evidence" ever attempted to be put before the lower court came in the form of an unsubstantiated pleading filed *after* the court had already ruled on the defendant's petition. This pleading stated only that Melissa

petitions for writ of error coram nobis in civil cases applies to petitions in criminal cases. *See State v. Mixon*, 983 S.W.2d 661, 668 (Tenn. 1999).

> Gooch, the woman Hughes testified had been with him at the time of the shooting, denied having been with Hughes at the time. . . . *Melissa Gooch was never effectively produced, nor has there been any showing on the record of favorable testimony that would have been elicited had Mr. Love been more diligent.* . . . [T]here is no cognizable proof in the record of any impeaching material.

Jackson v. State, *supra*, slip. op. at 11-12 (emphasis added). (App. 96-97)

Applying the standard of prejudice set forth in *Strickland*, the state court concluded, "[Jackson] has failed to carry his burden of proving that the outcome of the trial probably would have been different but for those errors." (App. 98) In sum, because Jackson failed to produce a material witness to support his ineffective assistance claim, the Tennessee Court of Criminal Appeals determined that Jackson failed to establish prejudice from counsel's alleged errors and affirmed the decision of the lower court.

III. The Opinions Below

1. The district court summarily dismissed Jackson's petition for writ of habeas corpus without conducting an evidentiary hearing. As to Jackson's claim of ineffective assistance of counsel, the district court concluded that the "State Court of Criminal Appeals' determination that prejudice had not been proved cannot be found unreasonable." In reaching its determination, the district court noted that, although the state court had been informed of the "existence" of a statement by Melissa Gooch, which could have been used to impeach the trial testimony of

Jonathan Hughes, Gooch "was never effectively produced for the [state] court." (App. 64)

2. The court of appeals reversed and remanded the case to the district court, concluding that "the Tennessee Court of Criminal Appeals both applied a burden of proof contrary to the burden articulated in *Strickland* and unreasonably applied *Strickland*'s holding to Jackson's claim." (App. 34-35) In finding the state court's decision to be an unreasonable application of *Strickland*, the court of appeals looked solely to a sworn statement of Melissa Gooch, which had been filed as an attachment to a "notice of filing" in the federal district court but had never been presented in state court proceedings, either through live testimony or by affidavit, nor properly admitted into evidence in the federal proceeding. (App. 104) Based upon that "evidence," the court of appeals concluded that counsel's failure to call Gooch as a witness at trial amounted to constitutional ineffectiveness. *Jackson v. Holland*, No. 01-5720, slip op. at 18-20 (6th Cir. 2003) (App. 24).

Further, while recognizing that the Tennessee Court of Criminal Appeals "articulated the correct prejudice standard from *Strickland*," the Sixth Circuit identified three isolated phrases in the state-court opinion, which it deemed evidence of the application of a "'preponderance of the evidence'-like" standard. On that basis, the Sixth Circuit concluded that the state court's citation of the correct standard was "mere lip service" to *Strickland* and condemned its decision as being "contrary to" established federal law under §2254(d)(1). (App. 29-30, 34)

REASONS FOR GRANTING THE WRIT

Petitioner Holland asks this Court to grant this Petition for Writ of Certiorari to clarify that, under 28 U.S.C. §2254(d)(1), a federal court reviewing a state-court adjudication of a federal constitutional claim is constrained to consider only evidence that was presented in the state-court proceeding. The only way the Sixth Circuit was able to find the Tennessee Court of Criminal Appeals' decision on Jackson's ineffective assistance of counsel claim to be an "unreasonable application" of *Strickland* was to consider "evidence" that was never presented to the state court. Indeed, the state court expressly stated in its opinion that the sole witness upon whom the Sixth Circuit's decision rests, Melissa Gooch, was "never effectively produced" in the state proceedings through formal testimony or even by affidavit. Rather, the only "evidence" in state court of Gooch's proposed testimony came in the form of an "unsubstantiated pleading" filed after the trial court had already rejected Jackson's post-conviction petition. Notwithstanding that fact, the Sixth Circuit held that the state court "applied *Strickland* in an objectively unreasonable manner by holding that Gooch's statement . . . did not establish a reasonable probability that, but for [counsel's] failure to interview Gooch prior to trial, a juror would have found that the State had failed to carry its burden of proof." (App. 24)

Compounding that error, the Sixth Circuit erroneously determined that, although the state court recognized and articulated the *Strickland* standard for prejudice, it applied a "'preponderance of the evidence'-like" standard in examining Jackson's claim. This was despite the state court's ultimate conclusion, consistent with *Strickland*, that, because Jackson failed to present any "cognizable

proof" of impeaching material, he "failed to carry his burden of proving that the outcome of the trial court probably would have been different but for [counsel's alleged] errors." (App. 33)

The Sixth Circuit's mode of analysis in both instances was contrary to the standard of review required under 28 U.S.C. §2254(d)(1) and this Court's decision in *Williams v. Taylor*, 529 U.S. 362 (2000). Under that standard, the Sixth Circuit should have accorded deference to the Tennessee Court of Criminal Appeals' decision, in light of the evidence actually before the state court, to determine whether that evidence reasonably could be construed in a way that upheld the decision. Instead, the Sixth Circuit wholly discounted the state court's findings on Jackson's evidentiary deficiencies and improperly considered a witness statement that, to this day, has never been properly admitted into evidence in any court of law, state or federal. Further, in its haste to fault the state court, the Sixth Circuit then cast aside as distinguishable this Court's admonition in *Woodford* that state-court decisions be "given the benefit of the doubt" in light of §2254(d)'s "highly deferential" standard for evaluating state-court rulings, parsed isolated phrases from the state court opinion, which it then held up as "evidence" of the state court's application of an inappropriately high standard and, on that basis, concluded that the state court "merely paid lip service" to *Strickland* by its single recitation of the reasonable probability standard. (App. 34)

Certiorari should be granted to clarify the deferential standard that must be applied by the federal courts under AEDPA. The Sixth Circuit's decision to grant federal habeas relief in this case, in the face of the state court's well-reasoned determination to the contrary, is another

instance of what has become a disturbing pattern of jurisdictional overreaching by some federal circuits in the context of federal habeas challenges to state-court criminal convictions. *See, e.g., Mitchell v. Esparza*, 540 U.S. ___, slip op. at 1 (2003) (*per curiam*) (Sixth Circuit decision "ignores the limits imposed on federal habeas review by 28 U.S.C. §2254(d)" and "failed to cite, much less apply, this section"); *Yarborough v. Gentry*, 540 U.S. ___, slip op. at 10-11 (2003) ("Ninth Circuit's conclusion . . . gives too little deference to the state courts that have primary responsibility for supervising defense counsel in state criminal trials"); *Price v. Vincent*, 538 U.S. 634, 123 S.Ct. 1848, 1852 (2003) ("Although the [Sixth Circuit] Court of Appeals recited [the AEDPA standard], it proceeded to evaluate respondent's claim *de novo* rather than through the lens of §2254(d)"); *Woodford v. Visciotti*, 537 U.S. 19, 20 (2002) (*per curiam*) (Ninth Circuit's grant of habeas relief "exceeds the limits imposed on federal habeas review by 28 U.S.C. §2254(d)"); *Early v. Packer*, 537 U.S. 3, 7-8 (2002) (*per curiam*) (same).

By considering "evidence" outside the state-court record – indeed, outside the evidentiary record of any court – the decision of the Sixth Circuit in this case goes even farther afield than the examples cited above, transgressing one of the most fundamental rules governing an appellate tribunal. *See Boone v. Chiles*, 35 U.S. (10 Pet.) 177, 208 (1836) (appellate courts "can act on no evidence which was not before the court below, or receive any paper that was not used at the hearing"). Certiorari is warranted under Supreme Court Rule 10(c).

I. THE SIXTH CIRCUIT'S DETERMINATION, THAT THE TENNESSEE COURT OF CRIMINAL APPEALS UNREASONABLY APPLIED *STRICKLAND* TO JACKSON'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, WAS IMPROPERLY BASED UPON "EVIDENCE" NEVER PRESENTED TO THE STATE COURT.

Jackson's federal habeas corpus petition, filed after April 24, 1996, is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). *Lindh v. Murphy*, 521 U.S. 320, 336-38 (1997). AEDPA substantially changed the role of the federal judiciary in reviewing habeas petitions, in particular, limiting the authority to grant the writ, even where the federal court concludes in its independent judgment that the decision of the state court was incorrect. *Bell v. Cone*, 535 U.S. 685, 693 (2002). As this Court explained in *Williams v. Taylor*, 529 U.S. 362 (2000), a federal court's inquiry is limited under AEDPA to the *reasonableness* of the state court's application of clearly established federal law. *Id.*, 529 U.S. at 412.

The standard for granting habeas relief with respect to claims that have been previously adjudicated on the merits in state court is a narrow one set forth in 28 U.S.C. §2254(d), which provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of,

clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

This Court has instructed that a state court's decision is "contrary to" Supreme Court precedent if the state court applies a rule that is different from the governing law set forth in Supreme Court decisions, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. A federal court may grant habeas relief under the "unreasonable application" clause if the state court correctly identifies the governing principal, but unreasonably applies it to the facts of the particular case. *Bell*, 535 U.S. at 694; *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). Because AEDPA's "new, highly deferential standard for evaluating state court rulings" is designed to "ensure that state-court convictions are given effect to the extent possible under law," a state court's ruling must be viewed in terms of its "objective reasonableness." *Bell*, 535 U.S. at 693; *Williams,* 529 U.S. at 403-04; *Lindh*, 521 U.S. at 333 n.7. It logically follows that the reasonableness of a state court's decision must be assessed in light of evidence actually presented in the state-court proceeding.

The primary thrust of Jackson's ineffective assistance claim in the state post-conviction proceeding was that defense counsel did not adequately investigate his case prior to trial. According to Jackson, had counsel interviewed all potential witnesses, he would have discovered impeachment evidence and/or witnesses that could have been used effectively to undercut the testimony of the

State's key eyewitness, Jonathan Hughes. In rejecting Jackson's claim, the Tennessee Court of Criminal Appeals found that Jackson had not introduced "a shred of evidence" on either day of the hearing that could have been used effectively against Hughes at trial.

> The only impeachment "evidence" ever attempted to be put before the lower court came in the form of an unsubstantiated pleading filed *after* the court had already ruled on the defendant's petition. This pleading stated only that Melissa Gooch, the woman Hughes testified had been with him at the time of the shooting, denied having seen Hughes at the time. (App. 96)

Although the state court discussed, in *dicta,* what effect the Gooch testimony, as articulated in Jackson's pleading, could have had upon the jury's verdict, it is clear that the state court's ultimate determination of Jackson's claim was based upon the *absence* of any "cognizable proof in the record of any impeaching material." In rejecting the Gooch "statement" as a basis for post-conviction relief, the state court cited the well-settled rule that a petitioner claiming that counsel was deficient in his or her investigation of the facts, or in failing to call a known witness at trial, is not entitled to relief unless "he can produce a material witness who (a) could have been found by a reasonable investigation *and* (b) would have testified favorably in support of his defense if called." *Jackson v. State*, No. 01C01-9412-CR-00427, 1995 WL 747843, at *9-10 (quoting *Black v. State*, 794 S.W.2d 752, 757-78 (Tenn. Crim. App. 1990)) (emphasis in original). (App. 96-97)

Based upon the record before it, the state court's adverse determination of Jackson's ineffective assistance claim was entirely reasonable. Because Jackson failed to

demonstrate through cognizable proof in the state court proceedings the substance of the testimony that his potential impeachment witness might have given, counsel's failure to interview her cannot be deemed constitutionally ineffective. *See, e.g., Burger v. Kemp*, 483 U.S. 776, 792 (1987) (where record contains no evidence that potential witnesses would have offered substantial mitigating evidence if they had testified, court may not reach the conclusion that counsel's failure to call the witnesses was unreasonable); *Bell v. Cone*, 535 U.S. at 697, n.4 (respondent's "fail[ure] to present *any* evidence regarding his counsel's mental health in state-court proceedings" fatal to his ineffective assistance claim on that basis). *See also Mitchell v. Esparza*, 540 U.S. at ___, slip op. at 7 n.3 (evidence brought to light in federal habeas proceeding, but not presented in state-court proceeding, has no bearing on correctness of state court's determination that failure to charge defendant as principal offender is harmless error).

The record is clear that at no point during Jackson's post-conviction proceedings did the state court hear testimony from Melissa Gooch, nor did it have before it even so much as an affidavit of the witness. Indeed, Gooch has never testified in *any court* regarding the events of the night in question. As noted in the state court opinion, "[n]o affidavit from Melissa Gooch was ever filed in this matter," nor was she ever "effectively produced" in the state post-conviction proceeding. (App. 88, 97) The federal district court recognized the fatal deficiency in Jackson's state court proof and granted summary judgment in favor of the warden, correctly noting that "Gooch's statement was not properly before the State appellate court." (App. 64) The Sixth Circuit, however, speculating what Gooch's testimony

may have been had she been called to testify based upon material outside the state court record, held:

> The Tennessee Court of Criminal Appeals applied *Strickland* in an objectively unreasonable manner by holding that Gooch's statement – which, if believed, casts serious doubt upon State star witness Hughes' account of events – did not establish a reasonable probability that, but for [counsel's] failure to interview Gooch prior to trial, a juror would have found that the State had failed to meet its burden of proof. In short, given the State's lack of physical evidence, the importance of Hughes' testimony to the State's case against Mr. Jackson, and the potential effect Gooch's statement could have had with the jury, it was objectively unreasonable for the Tennessee Court of Criminal Appeals to conclude as it did.

(App. 24-25)

Evidence not properly developed in state post-conviction proceedings has no place in a federal court's analysis of the reasonableness of a state court's application of clearly established federal law. A state court cannot and should not be faulted, as the Sixth Circuit did in this case, for failing to factor into its analysis of a defendant's ineffective assistance claim evidence never presented to it. *See, e.g., Williams*, 529 U.S. at 394-96 (assessing the reasonableness of the Virginia Supreme Court's decision under *Strickland* in light of evidence presented in the Virginia trial court). When a federal court expands its analysis to include matters outside the state court record, the inquiry has necessarily shifted from one of reasonableness, to one of correctness, a result that has been condemned repeatedly by this Court. *See, e.g., Bell*, 535 U.S. at 694; *Williams*, 529 U.S. at 411-13.

Here, the Sixth Circuit based its conclusion of "objective unreasonableness" upon its perception that the state court failed to recognize the full impeachment impact Gooch's testimony may have had on the jury in a case consisting primarily of eyewitness testimony and circumstantial evidence. "[G]iven the State's lack of physical evidence, the importance of Hughes' testimony to the State's case against Mr. Jackson, and the *potential effect Gooch's statement could have had with the jury*, it was objectively unreasonable for the Tennessee Court of Criminal Appeals to conclude as it did." (App. 25) (emphasis added) In denying Jackson's ineffective assistance claim, however, the Tennessee Court of Criminal Appeals properly observed that, "[i]t is elementary that neither a trial judge nor an appellate court can speculate or guess on the question of whether further investigation would have revealed a material witness or what a witness's testimony might have been if introduced by defense counsel." *Jackson v. State*, *supra*, 1995 WL 747843, at *9 (quoting *Black*, 794 S.W.2d at 757) (App. 96) The Sixth Circuit failed to heed this fundamental precept and, in so doing, exceeded the limited scope of review under AEDPA. By considering "evidence" outside the state post-conviction record to find that the state court unreasonably applied this Court's holding in *Strickland*, the court of appeals exceeded its authority under 28 U.S.C. §2254(d)(1), and certiorari is warranted under Supreme Court Rule 10(c).

II. THE SIXTH CIRCUIT ERRONEOUSLY DETERMINED THAT THE DECISION OF THE TENNESSEE COURT OF CRIMINAL APPEALS WAS "CONTRARY TO" *STRICKLAND* BY RELYING SOLELY UPON ISOLATED PHRASES IN THE STATE-COURT OPINION, TAKEN OUT OF CONTEXT, AS "EVIDENCE" OF THE APPLICATION OF A HIGHER BURDEN OF PROOF THAN THAT MANDATED IN *STRICKLAND*.

The Tennessee Court of Criminal Appeals articulated the proper standard for evaluating prejudice on a claim of ineffective assistance of counsel from this Court's decision in *Strickland v. Washington* and applied the correct standard in evaluating Jackson's claim. The state court framed its inquiry as follows:

> To succeed on a claim of ineffective assistance of counsel, the defendant must prove two things: first, that his lawyer's performance was deficient and second, that his lawyer's deficient performance adversely affected the defense. That is, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 697 (1984).

(App. 95)

Then, after reviewing the evidence before it, particularly the *absence* of proof regarding potential impeachment witnesses, the state court concluded that, "even if [Jackson] has shown that his trial counsel made errors both before and during the trial in satisfaction of the first prong of the *Strickland* test, he has failed to carry his burden of

proving that the outcome of the trial would probably have been different but for those errors." (App. 98)

In determining that the state court applied a higher burden of proof standard than that mandated by *Strickland*, the Sixth Circuit seized upon three isolated phrases in the state court opinion as "evidence" of the state court's analytical deficiency. First, the Sixth Circuit pointed to the state court's observation that, "[i]n a post-conviction proceeding, the defendant has the burden of proving his allegations by a preponderance of the evidence." What the Sixth Circuit apparently fails to comprehend, however, is that the state court was not referring in that instance to the prejudice prong for ineffective assistance of counsel at all. Rather, the court was merely reciting the state-law requirement that, in a post-conviction proceeding under Tenn. Code Ann. §40-30-101 *et seq.* (1990 Repl.), the burden rests with the petitioner to prove by a preponderance of the evidence the allegations in his petition. *See Clenny v. State*, 576 S.W.2d 12 (Tenn. Crim. App. 1978), *cert. denied*, 441 U.S. 947 (1979); *Turner v. State*, 698 S.W.2d 90 (Tenn. Crim. App. 1985). The Sixth Circuit's misconstruction of the state-court opinion surely does not render the state-court opinion "contrary to" Supreme Court precedent.

The Sixth Circuit then "excerpted" language from the state court's hypothetical discussion of the impact the testimony of Melissa Gooch may have had upon the jury's verdict – "On the basis of the record before this Court, it is asking too much that we draw the inference that the jury *would not have believed Hughes at all* had Melissa Gooch testified." (App. 29) As indicated above, however, the state court's ultimate determination of Jackson's claim was based upon the *absence* of any "cognizable proof in the

record of any impeaching material," not upon an assessment of *strength* of that evidence in light of evidence actually presented at trial.

Finally, the Sixth Circuit identified the state court's shorthand use of the term "probably," without the modifier "reasonably," in its conclusion that Jackson failed to demonstrate prejudice – "[Jackson] has failed to carry his burden of proving that the outcome of the trial *would probably have been different* but for these errors." (App. 30) But as this Court observed in *Woodford*, a state court's "occasional shorthand reference to [the *Strickland* prejudice] standard by use of the term 'probable' without the modifier may perhaps be imprecise, but if so it can no more be considered a repudiation of the standard than can this Court's own occasional indulgence in the same imprecision." *Woodford*, 537 U.S. at 23-24 (citing *Mickens v. Taylor*, 535 U.S. 126, 166 (2002) ("probable effect on the outcome"); *Williams v. Taylor*, 529 U.S. 362, 393 (2000) ("probably affected the outcome").

Despite the state court's direct quotation and citation to *Strickland*, the Sixth Circuit, citing the three instances above, faulted the state court for "repeatedly referenc[ing] a 'preponderance of the evidence'-like standard in examining whether Jackson had been prejudiced by his counsel's performance." (App. 33) Instead of attempting to reconcile the state court's decision with the rule of *Strickland*, the Sixth Circuit boldly accused the state court of citing *Strickland* merely as a ruse – "the state court merely paid lip service to *Strickland*'s reasonable probability standard" – to disguise the imposition of an improperly higher burden of proof on Jackson. The Sixth Circuit's "readiness to attribute error" to the Tennessee courts is wholly inconsistent with the presumption that the state courts

know and follow the law and is incompatible with the "highly deferential standard for evaluating state-court rulings" of §2254(d). *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002).[2]

AEDPA requires that the entirety of the state-court decision be considered and given effect "to the extent possible under the law." *Bell*, 122 S.Ct. at 1849 (citing *Williams*, 529 U.S. at 403-04). The Sixth Circuit's approach in this case jeopardizes state-court convictions based solely upon a federal court's perception of the quality of the state court's written opinion. Such a process-oriented approach has been rejected by some federal circuits in the context of §2254(d)'s "unreasonable application" clause as inconsistent with AEDPA's "highly deferential" standard of review. *See, e.g., Neal v. Puckett*, 286 F.3d 230, 244-46 (5th Cir. 2002) (*per curiam*). Scrutinizing the state court's decision-making process, according to Chief Judge Posner of the Seventh Circuit Court of Appeals, places the federal court in "just the kind of tutelary relation to the state courts that [AEDPA was] designed to end" and may result in a situation where a habeas prisoner receives a new trial, not on the basis of constitutional

[2] The Sixth Circuit "distinguished" this case from *Woodford* by noting that the Tennessee court articulated the *Strickland* standard a single time, whereas the California Supreme Court made numerous references to *Strickland* in *Woodford*. "Here, the Tennessee Court of Criminal Appeals, like the state court in [*Woodford*], articulated the correct standard from *Strickland* . . . But unlike the California Supreme Court's decision in [*Woodford*], the state court decision at issue here made no further reference to *Strickland* or its prejudice standard." (App. 33) However, *Woodford* cannot be read to require multiple citations to *Strickland* in order to clear the "contrary to" clause hurdle established by §2254(d)(1).

error, but due to a mere lapse in "judicial articulateness." *Hennon v. Cooper*, 109 F.3d 330, 334-35 (7th Cir. 1997). The same reasoning applies to an examination of a state-court decision under §2254(d)'s "contrary to" clause, with the appropriate focus being upon the state court's ultimate legal conclusion. *See, e.g., Williams*, 529 U.S. at 391-92 (Virginia Supreme Court decision "contrary to" established federal law by holding that *Lockhart v. Fretwell*, 506 U.S. 364 (1993), modified or supplanted the rule of *Strickland*); *but see Early v. Packer*, 537 U.S. at 8 (decision not "contrary to" Supreme Court precedent "so long as neither the *reasoning* nor the result of the state-court decision contradicts them") (emphasis added).

The Sixth Circuit's decision wholly discounts the Tennessee Court of Criminal Appeals' statement and application of *Strickland* as the controlling legal authority and, in so doing, seriously undermines the "highly deferential" standard mandated by AEDPA. *Lindh*, 521 U.S. at 333 n.7. Certiorari review is thus warranted under Supreme Court Rule 10(b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 01-5720

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JESSIE L. JACKSON Petitioner-Appellant, v. FLORA HOLLAND Respondent-Appellee.	) ON APPEAL FROM THE) UNITED STATES DIS-) TRICT COURT FOR THE) MIDDLE DISTRICT OF) TENNESSEE)) (Filed Aug. 21, 2003)

BEFORE: MERRITT and DAUGHTREY, Circuit Judges; RUSSELL, District Judge*

RUSSELL, District Judge. Petitioner Jessie Jackson appeals the district court's grant of summary judgment to the respondent, Warden Flora Holland, upon his petition for habeas corpus under 28 U.S.C. § 2254. The

* Honorable Thomas B. Russell, United States District Judge for the Western District of Kentucky, sitting by designation.

lower court concluded that although the petitioner had demonstrated a constitutional deprivation of his Sixth Amendment right to effective assistance of counsel, the deferential standard of review of 28 U.S.C. § 2254(d) prohibited it from granting relief. We agree with the former conclusion but not the latter, and we therefore **REVERSE** the decision of the district court.

BACKGROUND

A. Factual Background

In 1987, Jackson was convicted of first degree murder and sentenced to life imprisonment. The underlying facts are not disputed. As set forth by the Tennessee Court of Criminal Appeals, they are as follows:

> On February 2, 1986, Sharon Bryant and her boyfriend, the victim James Crawley, hosted a party at the apartment they shared at the University Court housing project in Nashville, Tennessee. The purpose of the party was to raise money via a card game called "Tonk." The victim needed the money for car repairs. Numerous people had been invited to the party, including the defendant, who was a friend of the victim.
>
> The party was already in progress when the defendant arrived with the victim at some time between 9:00 and 10:45 p.m. After arriving, the defendant alternated between playing cards and going upstairs with the victim. Ms. Bryant testified that she had heard arguing the last time the defendant was upstairs with the victim, and that she had told them to come back downstairs. When they did, the defendant resumed playing cards. Bryant also testified that the defendant

> and the victim had both been "high." The defendant denied that he had been arguing with the victim.
>
> After the defendant had resumed playing cards, three more male guests arrived and wanted to play dice. The victim then left, telling Bryant that he was going to get some dice. He also told her, "I have the money to get my car fixed," and patted one of his pockets. The defendant testified that the real reason the victim left was to sell some cocaine. Bryant testified that if the victim had had the money, it had come from some source other than the card game. [FN 1: After the victim had been taken to the hospital, his clothing was searched and twenty-five dollars ($25) cash was found. Bryant testified that the victim had needed one hundred dollars ($100) for the car repairs.] Shortly thereafter, the defendant asked Bryant where the victim had gone. She told him that he had gone to get some dice. The defendant then left, leaving some money on the card table. A few minutes later, the victim's cousin came by and told Bryant that her boyfriend had been shot.
>
> The victim's body was lying in front of a long, rectangular apartment building in University Court. The building was located on a corner, with its long side facing one street and running parallel with it ("A Street"), and running perpendicular to the intersecting street ("B Street"). [FN 2: The actual names of the streets were not discernable from the record. These arbitrary names are designated in an effort to lend clarity to the description of the murder scene.] The victim had been shot in front of the far end of the building, looking down A Street from the corner. This building was several buildings away from the one

in which Bryant's apartment was located. There was testimony that the area where the victim was shot was known for quick and numerous drug transactions. There was a streetlight nearby.

Bryant testified that on arriving at the place where her boyfriend was lying, she had seen the victim's aunt, Freddie Davis, Jonathan Hughes and "another guy" there. Then numerous other people arrived. She testified that the defendant had arrived at about the same time as the ambulance. At that point, she testified, the defendant had tried to comfort her. She further testified that she had spoken with the defendant after she got back from the hospital and that he had mumbled something that she had thought was, "I didn't mean to do it." She testified that when she had questioned him about this, he said, "They didn't have to do it. They didn't have to kill him. He was too little to get shot. They could have beat him up." She testified that she had then asked him who did it, and he had replied, "They said, Frankenberry did it" and "you know they got into an argument," to which she had replied, "I heard." Bryant also testified that later in the evening she had asked the defendant if the victim had been killed over drugs or money and that he had replied, "No, [it] wasn't about drugs and it wasn't about any money." She had then asked what it was about and he replied, "I'm too upset. I can't talk. I'll come back tomorrow and tell you." Bryant testified that the defendant had not later explained why the victim had been shot, but did deny shooting him.

Jonathan Hughes testified that he had been sitting on a car parked along B Street when he saw the victim walking down the sidewalk.

Hughes testified that the defendant had been walking down the street behind the victim, telling him to "Come here and let me holler at you for a minute." Hughes testified that the victim had responded that he didn't have time, he was looking for his money. According to Hughes, the defendant had continued to follow the victim. Paul Ray Jones, Hughes' cousin, testified that he had been with Hughes and had also seen the defendant and the victim walking down the street.

Hughes testified that Jones had then told him that his girlfriend, Melissa Gooch, wanted to talk to him. At this, Hughes had started down B Street to meet his girlfriend, walking on the opposite sidewalk and somewhat behind the victim and the defendant, but going in the same direction. A short distance later, where B Street intersected A Street, Hughes testified that he and his girlfriend had turned left while the defendant and the victim turned right. He further testified that he and Gooch had then heard two shots, at which they had turned around, looked up A Street, and saw the defendant fire two shots at the victim. Hughes testified that he had then seen the defendant bend down, roll the victim over, and run around the far corner of the building. Hughes testified that he had then gone to where the victim was lying, arriving there after ten or fifteen others had.

Two other witnesses testified that they had seen the defendant running at some distance from the body, but in a direction away from the body, and that he had been trying to hide his face behind his jacket. These sightings were immediately after the shooting, at about 12:30 a.m. The defendant denied taking any such actions.

Melissa Gooch was not called to testify by either the defendant or the State.

The defendant denied shooting the victim. He testified that he and the victim had not had an argument that night and that the victim was trying to sell some cocaine. He testified that he had brought a small amount of cocaine to the party as a gift to the host and hostess, but that the victim had wanted to add it to some cocaine he already had and sell the entire amount to a third party. The defendant testified that he had been agreeable to this so long as the victim repaid him a previous ten dollar ($10) loan out of the proceeds. The victim was reluctant to do this because he needed the money for his car.

The defendant testified that he had left the party because two of the three newcomers had "appeared to be gangster[s]," so he had gone to his pickup truck to get his pistol for protection. [FN 3: The pistol that the defendant had and which was recovered by the police during a consensual search was not the murder weapon.] On the way back to the apartment from his truck, the defendant testified, he had met the same three men who then told him that the victim had been shot. At that point, the defendant testified, he had walked down to the murder scene, hiding his pistol under a fence on the way. The defendant denied that he had been on the street where Hughes claimed to have seen him.

Freddie Davis testified that he had been walking from his mother's apartment to his sister's apartment when he saw the victim and someone else he couldn't identify walk up to a brown and beige car on A Street. Davis testified that "they was talking for a minute and then the

next thing I know the dude just come out of his car and just started shooting." Davis testified that he had then run to his sister's apartment to tell her, and had then gone down to where the victim was lying. The angle of Mr. Davis' view was approximately perpendicular to that of Hughes but, from a review of the exhibits, the jury could reasonably have concluded that the distance of each witness from the scene of the shooting was roughly about the same. Davis testified that the car had taken off and that he was with the victim when he died. Davis also testified that "everybody [had been] saying that Frankenberry had shot" the victim. Davis reported this information to the police, who then put a "pick-up" out on the vehicle. Detective Wynn testified that they had investigated a car that matched the description given and had tried to develop information on a Frankenberry, but that they had not come up with any other indication that Frankenberry had been involved, and had not tied the vehicle to the crime.

Davis also testified that he had not seen Jonathan Hughes at the scene and that the other person who had been with the victim when he was shot had run off. Davis testified that this person had been wearing blue jeans and a gray jacket. The defendant had been wearing red pants on the night in question. Davis admitted on cross examination that he had drunk two to four half-pints that night prior to the shooting.

The victim had been shot with a .25 caliber gun and three .25 caliber bullets were recovered from his body. The murder weapon was never found. However, John Crawford testified that he had seen the defendant pull a pistol out from under a car seat nine to ten months before the

> shooting and that, although he could only see a portion of the pistol because the defendant had had it "cuffed up," he thought it was a .25 caliber pistol. Terry Merrill testified that, after the shooting, he had seen the defendant retrieve a gun from under a fence between two buildings and put it in his pants. The defendant testified that this had been the .22 caliber pistol that he had hidden after learning of the victim's death. The defendant testified that he had never had a .25 caliber gun.

Jackson v. State, No. 01-C-01-9412-CR-00427, 1995 WL 747843, at *1-4 (Tenn. Crim. App. Dec.19, 1995).

When interviewed by investigators in 1994, Gooch provided a sworn statement that, contrary to Hughes testimony, she was not with Hughes on February 2, 1986 and did not see Jackson shoot Crawley. (J.A. at 35.)

B. Procedural Background

On August 25, 1987, Jackson filed a notice of appeal from his criminal conviction, but the appeal was dismissed in May 1988 at the request of Jackson and his counsel. (Final Brief of Appellee, p. 4; Final Brief of Appellant, p. 3.) Ten months later, in March 1989, Jackson filed a petition for postconviction relief alleging ineffective assistance of counsel. Specifically, Jackson argued that his trial counsel was ineffective because he (1) failed to interview several witnesses prior to trial, (2) waived Jackson's preliminary hearing, (3) failed to file a request for discovery and inspection, (4) failed to discover an investigating officer's report containing information about another suspect, (5) failed to request *Jencks* material after the state's witnesses testified, (6) failed to prepare Jackson for

his testimony, and (7) failed to effectively cross examine the state witnesses. *Jackson,* 1995 WL 747843, at *8.

Jackson's trial counsel, Doug Love, testified at a hearing in July 1990. In February 1991, Jackson filed an "Amendment to Petition for Postconviction Relief." Additional evidence was presented at a hearing in May 1991, at which Love, Jackson, Detective Terry McElroy, Jonathan Hughes, Sharon Bryant, and Ethel Robertson testified.

The Tennessee Court of Criminal Appeals summarized the evidence presented as follows:

> Mr. Love testified that he had been licensed to practice in the State of Tennessee in 1979 and that he had been practicing primarily criminal law in this state since that time. The defendant hired Mr. Love to represent him in the trial of this matter. Mr. Love testified that he had met with the defendant in his office "at least a half a dozen" times, discussing matters for fifteen to thirty minutes on each occasion. Mr. Love also went out with the defendant to University Court at least twice where Mr. Love viewed the relevant area and drew two diagrams. The defendant told Mr. Love the names of several witnesses, which Mr. Love wrote down, including Freddie Davis and Sharon Bryant. Although the record is clear that Mr. Love spoke with Davis prior to the trial, it is unclear whether he spoke with Bryant. Mr. Love also testified that he and the defendant had discussed the defendant's own testimony and the nature of anticipated cross-examination, although they did not go through a "formal rehearsal." Mr. Love testified that he had felt adequately prepared when they went to trial.

Mr. Love explained that he had not filed a request for discovery and inspection because he had discussed the case with the State's attorney at least twice and had had an opportunity to review the State's file which, apparently, contained transcripts of the statements made to the police by Hughes, Bryant, Mark Crawford and Bryant's sister. Although he admitted that he had not spoken with Hughes prior to the trial, he testified that he felt that he had gotten what information he needed about Hughes' anticipated testimony from the State.

Although Mr. Love could not remember specifically why the preliminary hearing was not had in this matter, he testified that he assumed it had been waived to get a favorable bond reduction, and that he thought there were ways other than a preliminary hearing to "get the information necessary to try a case." There is no proof in the record that Mr. Love would have obtained information at the preliminary hearing that he could have used to the defendant's advantage at trial.

Jackson, 1995 WL 747843, at *8-9.

Jackson presented additional evidence in support of his claim. He argued that the issue of bond was never raised and that the face of the arrest warrant did not support Love's supposition about why he waived the preliminary hearing. Love explained that he did not request discovery because he was relying on a conversation with the prosecutor and was able to review the prosecutor's file; Jackson argued that Love did not even take notes when reviewing these files. None of the state witnesses recalled speaking with Love, and Love did not recall interviewing any of them. Love was on vacation for

the four days before the start of Jackson's trial and apparently acting under the mistaken impression that the trial would be continued. Finally, Love never requested available *Jencks* material. (J.A. at 57.)

In July 1994, the Tennessee lower court denied Mr. Jackson's petition for postconviction relief. *Jackson*, 1995 WL 747843, at *5. The court found "as a matter of law that any arguable deficiency on the part of Mr. Love would not have resulted in a different outcome in this case." *Id.* On August 8, 1994, Mr. Jackson filed a Motion for Hearing in the Nature of a Motion for a New Trial, alleging that newly discovered evidence, specifically Ms. Gooch's testimony, required an evidentiary hearing and a reopening of the proof. *Id.* The lower court summarily denied this motion.

Simultaneous with his Motion for Hearing in the Nature of a Motion for a New Trial, Jackson also appealed the lower court's decision to the Tennessee Court of Criminal Appeals. The state appellate court affirmed the lower court's decision on December 19, 1995. The appellate court determined that the lower court had properly exercised its discretion in refusing to reopen the proof to consider Gooch's testimony. *Id.* at *5-6. In affirming the lower court decision, the appellate court considered the fact that Jackson had already filed a motion for new trial and that he knew Gooch's name at the time of the trial. *Id.* at *6. With regard to Jackson's ineffective assistance of counsel claim, the court never squarely addressed the question of whether Love's performance was ineffective, but based its decision on the determination that Jackson was unable to establish prejudice. *Id.* at *9-10.

Following the Tennessee Court of Criminal Appeals's affirmance of the lower court's ruling, Jackson applied for permission to appeal, which the Tennessee Supreme court denied on June 10, 1996.[1]

On April 23, 1997, Jackson filed a *pro se* petition for federal habeas relief. The district court appointed the Federal Public Defender to represent Jackson, who requested that Jackson's petition be held in abeyance while he exhausted state remedies. (J.A. at 61.)

Once the case was reopened, Holland moved to dismiss portions of Jackson's ineffective assistance of counsel claim and moved for summary judgment. (J.A. at 3.) The district court denied the motion to dismiss, but granted the motion for summary judgment. Although the court believed that Jackson's trial counsel was ineffective and that Jackson had been prejudiced by his counsel's ineffectiveness, the district court determined that the restrictions of 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"), precluded it from granting relief. (J.A. at 67.) Specifically, the district court found that the Tennessee court correctly identified *Strickland v. Washington*, 466 U.S. 668 (1984), as the governing law (J.A. at 67) and reasonably applied it to Jackson's claim. (J.A. at 73.)

[1] Jackson also filed a second petition for post-conviction relief in the state court that has no bearing on the ineffective assistance of counsel claim.

Finding that "the evaluation of unreasonableness under 28 U.S.C. § 2254(d)(1) is debatable among reasonable jurists," the district court issued Jackson a certificate of appealability with regard to whether the state court unreasonably applied *Strickland* to Jackson's claim of ineffectiveness. (J.A. at 89.)

STANDARD OF REVIEW

This court reviews the district court's disposition of a petition for habeas corpus *de novo*. *See Cook v. Stegall*, 295 F.3d 517, 519 (6th Cir. 2002). The district court's factual findings, however, are reviewed for clear error. *See id.*

The court's review of Mr. Jackson's § 2254 petition is governed by Chapter 153 of AEDPA. Under this statute, a federal court reviewing a state prisoner's petition for a writ of habeas corpus under 28 U.S.C. § 2254 must first determine whether a constitutional right has been violated. *See Williams v. Taylor*, 529 U.S. 362, 367 (2000). If the answer is in the affirmative and the state court adjudicated the claim on its merits, this Court must then employ the new standard of review set forth in 28 U.S.C. § 2254(d) to determine whether to grant a writ of habeas corpus. *Williams*, 529 U.S. at 367, 402-403, 412-413. As amended by Chapter 153 of AEDPA, § 2254(d) provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
>
> (2) Resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Under the "contrary to" clause of § 2254(d)(1), the Court may grant the writ "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams,* 529 U.S. at 412-413. Under the "unreasonable application" clause of § 2254(d)(1), the Court may grant the writ "if the state court identifies the correct governing principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. To meet this standard, the state court's application of clearly established federal law must be more than incorrect or even clearly erroneous, it must be objectively unreasonable. *Lockyer v. Andrade*, ___ U.S. ___, 123 S.Ct. 1166, 1174-75 (2003). Though the Supreme Court has not yet interpreted the "unreasonable determination" clause of § 2254(d)(2), based upon the reasoning in *Williams,* it appears that a court may grant the writ if the state court's decision is based on an objectively unreasonable determination of the facts in light of the evidence presented during the state court proceeding. *Accord Torres v. Prunty,* 223 F.3d 1103, 1107-08 (9th Cir. 2000) (determining that

"unreasonable" in § 2254(d)(1) had same meaning as "unreasonable" in § 2254(d)(2)). In substance, § 2254(d), as amended by Chapter 153 of AEDPA, places a new constraint on the power of the Court to grant Jackson's application for a writ of habeas corpus as to constitutional claims adjudicated on the merits in the state court. *Williams,* 529 U.S. at 412.

DISCUSSION

A. Clearly Established Supreme Court Precedent

The merits of Mr. Jackson's claim of ineffective assistance of counsel are governed by *Strickland v. Washington,* 466 U.S. 668 (1984), under principles that are "clearly established" for purposes of 28 U.S.C. § 2254(d). *Williams v. Taylor,* 529 U.S. 362, 390 (2000). Under *Strickland,* a criminal defendant must satisfy two requirements in order to succeed on his claim of constitutionally ineffective assistance of counsel. First, the defendant must demonstrate that his counsel's performance was so deficient that it "fell below an objective standard of reasonableness," such that his attorneys were not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland,* 466 U.S. at 687-88. Second, the defendant must demonstrate that his attorney's deficient performance prejudiced his defense. *Id.* at 687. Both deficient performance and prejudice must be shown before a defendant's conviction becomes so constitutionally suspect that it must be overturned. *Bell v. Cone,* 535 U.S. 685, 695 (2002) (citing *Strickland,* 466 U.S. at 687); *Stanford v. Parker,* 266 F.3d 442, 454 (6th Cir. 2001).

In evaluating a criminal defendant's claim of objectively unreasonable behavior by his attorney,

a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and make all significant decisions in the exercise of reasonable professional judgment.

Strickland, 466 U.S. at 690. "The court also must not indulge in hindsight, but evaluate the reasonableness of counsel's performance within the context of the circumstances at the time of the alleged errors." *McQueen v. Scroggy,* 99 F.3d 1302, 1311 (6th Cir. 1996). Tactical decisions of trial counsel "are particularly difficult to attack, and a defendant's challenge to such decisions must overcome a presumption that the challenged action might be considered sound trial strategy." *Id.* (quotation marks and citations omitted). However, a court reviewing an ineffective assistance claim "must make an independent judicial evaluation of counsel's performance" to "ensure that counsel acted reasonably under all the circumstances." *Id.*

Because the performance of Mr. Jackson's attorney must be measured for reasonableness under prevailing professional norms, trial counsel was bound by a standard of care applicable when this case was tried in 1987 in Davidson County, Tennessee. The district court found this standard to be articulated in *Baxter v. Rose,* 523 S.W.2d 930 (Tenn. 1975) – a conclusion that neither party has disputed. In *Baxter,* the Tennessee Supreme Court adopted as a measure of competency the Sixth Circuit's requirement that defense counsel perform at least as well as a lawyer with ordinary training and skill in criminal law; conscientiously protect his client's interest, undeflected by conflicting considerations; and investigate all apparently substantial defenses available to the defendant and assert them in a proper and timely manner. *Id.* at 934-35 (quoting *Beasley v. United States,* 491 F.2d 687, 696 (6th Cir. 1974)); *see also id.* at 936. Directly relevant to the present case, *Baxter* adopted the more specific duties set forth in *United States v. DeCoster,* 487 F.2d 1197 (D.C. Cir. 1973):

> Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. [T]he adversary system requires that all available defenses are raised so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, or [sic] course, the duty to investigate also requires adequate legal research.

Baxter, 523 S.W.2d at 933 (quoting *DeCoster,* 487 F.2d at 1203-04) (internal quotation marks omitted); *see also id.* at 936.

Against this backdrop of professional duties, it is not difficult to conclude that Mr. Love rendered deficient assistance that fell below an objective standard of reasonableness. At the very least, Love failed to impeach many of the State's witnesses with prior inconsistent statements to police,[2] and failed to adequately interview potential witnesses, including Walter Ezell, who described to police seeing a black man with a brown jacket and brown pants get into a brown car that sped away just after the shooting (Addendum 6), and Melissa Gooch,[3] who denied being with

[2] Jonathan Hughes twice recounted seeing a brown Lincoln driving at a high rate of speed on the night of the shooting in separate statements to the police (Addendum 2 at 2; Addendum 3 at 1), yet testified at trial that he had seen no such vehicle (Tr. I at 70). Mark Crawford at trial described walking with Steve Crawley when the two saw Mr. Jackson run through a fence away from the shooting and toward his sister's house (Tr. I at 58-62), but previously told police that he had been standing with Jonathan Hughes and Steve Crawley when James Crawley was shot (Addendum 4 at 2). Paul Ray Jones testified at trial that he saw Jackson and Crawley walking together just before Crawley was shot, that he left for home and Hughes left to see his girlfriend just before the shooting, and that he heard no shots. (Tr. II at 7-9.) To the police, however, Jones said that he, Jonathan Hughes, and Eddie McKissack heard three "real loud" shots and ran up the street to seek Crawley lying on the ground. (Addendum 8.)

[3] When evaluating Jackson's contention that the lower court erred by refusing to reopen the proof to allow Melissa Gooch to testify, the Tennessee Court of Criminal Appeals held that as a matter of state law Jackson's failure to timely present Ms. Gooch as a witness justified the lower court's refusal. *Jackson,* 1995 WL 747843, at *5-6. The Tennessee appellate court did not, however, employ this rationale to reject Jackson's ineffective assistance of counsel argument. *Id.* at *8-10. Accordingly, the "adequate and independent state ground" rule of

(Continued on following page)

Hughes or seeing Crawley's murder. While defense counsel is not subject to an absolute duty to investigate particular facts or a particular line of defense, *Chandler v. United States,* 218 F.3d 1305, 1317 (11th Cir. 2000) (en banc); *see Strickland,* 466 U.S. at 688-90, Mr. Love's conduct in this instance was objectively unreasonable.

As stated *supra,* however, this does not end the inquiry under *Strickland*'s two-pronged system. Instead, Jackson still must prove "prejudice" under *Strickland*'s second prong to establish a constitutional violation. "Prejudice" under the second prong may be either actual or presumed. Prejudice is presumed only where there has been actual or constructive denial of the assistance of counsel, where there has been state interference with counsel's assistance, where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," *United States v. Cronic,* 466 U.S. 648, 659 (1984), or where defense counsel "actively represented conflicting interests" and that "actual conflict of interest adversely affected his . . . performance." *Strickland,* 466 U.S. at 692; *accord Bell v. Cone,* 535 U.S. 685, 695-96 (2002); *see also Mickens,* 535 U.S. 162, 122 S. Ct. at 1240-41 (prejudice need not be shown "where assistance of counsel has been denied entirely or during a critical stage of the proceeding"). In all other instances, a defendant seeking to satisfy *Strickland*'s second prong must demonstrate actual prejudice by "show[ing] that there is a reasonable probability[4] that, but for counsel's unprofessional errors, the

Coleman v. Thompson, 501 U.S. 722 (1991), is inapplicable to Jackson's ineffective assistance of counsel claim.

[4] A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Strickland,* 466 U.S. at 694.

result of the proceeding would have been different." *Strickland,* 466 U.S. at 694 (footnote added). In other words, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

Both deficient performance and prejudice (whether actual or presumed) must be shown before a defendant's conviction becomes so constitutionally suspect that it must be overturned. *Bell,* 535 U.S. at 695 (citing *Strickland,* 466 U.S. at 687); *Stanford v. Parker,* 266 F.3d 442, 454 (6th Cir. 2001).

The evidence at Jackson's trial, at the postconviction hearing, and in Melissa Gooch's statement essentially reveals two competing versions of events. In the version advanced by Petitioner, he and James Crawley never argued and Jackson left the party to get his .22 caliber weapon for protection from the three "gangsters." As he headed back to the party, Jackson encountered these three individuals, who told him that Crawley had been shot. The four then headed toward the scene of the shooting, with Jackson leading the other three through a fence, where he dropped off his .22 caliber pistol. When the four arrived at the scene, Steve Crawley, Mark Crawford, Stephanie,[5] Freddie Davis, and Sharon Bryant were already there. Staying until the ambulance arrived, Jackson then went to his sister's house, stopping on the way to pick up his gun.

[5] It is unclear from the record precisely who "Stephanie" is, although it appears that she might be a cousin of the victim.

In the version of events advanced by the State, Jackson and James Crawley got into an argument over drugs, Jackson followed Crawley outside, and eventually shot him. After shooting Crawley, Petitioner fled towards his sister's house. A few minutes later, Jackson returned to the scene of the shooting where he muttered a confession to Sharon Bryant.

Jonathan Hughes was unquestionably the State's most important witness against Jackson. His testimony not only placed Jackson at the scene, but affirmatively made him the shooter. Absent Hughes's testimony, the State could produce no eyewitness who actually saw Jackson shoot Mr. Crawley. The only other significant witness testimony supporting the State's theory of the case was Steve Crawley and Mark Crawford's trial description of seeing Petitioner running from the scene, John Crawford's testimony that he'd seen Petitioner 9-10 months prior with a .25 caliber handgun, and Sharon Bryant's testimony of Jackson's muttered confession and his prior argument with James Crawley. Other than this witness testimony, no physical evidence linked Petitioner to the crime.

Conversely, Jackson's version of events was supported by his own testimony, as well as the testimony of Freddie Davis, who claimed to have seen someone else shoot James Crawley, and Detective Terry McElroy, who memorialized Davis's statement after the shooting.

Had Mr. Love fulfilled his duties as Jackson's advocate, Jackson would have been able to impeach Hughes's account with Melissa Gooch's testimony, as well as with Hughes's prior statement to police about seeing a brown Lincoln. Petitioner could have buttressed Freddie Davis's

story with Walter Ezell's similar recollection. He also could have called into question Hughes's account by contrasting it with Mark Crawford's February 5 recollection to the police of standing with Hughes when Crawley was shot and with Jones's statement to the police that he, Hughes and Eddie McKissack had heard three "real loud" shots and had run up the street to see Crawley lying on the ground.

In light of the weak proof supporting the State's case against Petitioner and the number of conflicting accounts of events, we concur with the district court that Mr. Jackson has satisfied the prejudice prong. Petitioner has presented sufficient evidence to demonstrate a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.

B. Unreasonable Application of *Strickland*

As the previous discussion reveals, the Tennessee Court of Criminal Appeals rendered a decision in Mr. Jackson's state collateral attack proceeding that was based on an incorrect application of clearly established federal law. For Mr. Jackson to be entitled to relief, however, he must meet the elevated burden of § 2254(d)(1) by showing that the decision involved an unreasonable application of, or is clearly contrary to, that clearly established federal law.

Mr. Jackson first argues that the state court decision involved an unreasonable application of *Strickland v. Washington,* 466 U.S. 668, (1984). As explained by the Supreme Court in *Williams v. Taylor,* "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." 529 U.S. 362, 410 (2000).

Indeed, even a state court's clearly erroneous application of federal law will not justify relief under this prong of § 2254(d)(1) unless it is also objectively unreasonable. *Lockyer v. Andrade,* ___ U.S. ___, 123 S. Ct. 1166, 1174-75 (2003).

In support of his argument, Jackson points to the fact that the state court decision is inherently inconsistent. The Tennessee Court of Criminal Appeals noted that "the case against the defendant hinged on whether the jury chose to believe Hughes' account of who shot the victim (which was bolstered by two witnesses who claimed to have seen the defendant running from the scene), or the defendant's and Davis' accounts." *Jackson v. State,* 1995 WL 747843, at *10. At the same time, the court dismissed the notion that evidence indicating Gooch was not with Hughes on the night of the murder would have affected the outcome of the trial, reasoning that "it in no way rises to the level of contradicting what Hughes claims to have seen." *Id.* at *9. In other words, despite recognizing the importance of Hughes's testimony to the State's case, the court concluded that the impeachment evidence was insubstantial because it did not discredit Hughes's testimony with regard to the shooting. Petitioner argues that any impeachment evidence, regardless of whether it went to the shooting itself, could have convinced the jury to credit the testimony of Davis and Jackson over the testimony of Hughes.

At trial, Hughes testified that on the night of the shooting, while he was sitting on a car with Ray Jones, he saw Crawley walking down the street and Jackson trying to talk with him. Jones then told Hughes, according to Hughes's testimony, that his girlfriend, Gooch, wanted to talk to him. Hughes testified that he left Jones to meet

Gooch down the street. According to his testimony, he was with her when they both heard gunshots and both turned around to see Jackson shooting Crawley. *Id.* at *2. Gooch, however, provided a sworn statement that she was not with Hughes that night and was uncertain as to why he would have testified as he did. (J.A. at 35.)

Our analysis of the record in this case convinces us that the state courts' finding that Mr. Jackson was not prejudiced by his counsel's performance is objectively unreasonable. Conceding only that Gooch's account of events "might have affected Hughes' credibility in some minimum way," *Jackson,* 1995 WL 747843, at *9, the Tennessee Court of Criminal Appeals recognized only two possible effects that Gooch's account might have had upon the jury: (1) that the jury would have disbelieved Gooch entirely and still fully credited Hughes's testimony; and (2) that the jury would conclude that Hughes had accurately remembered seeing Jackson shoot Crawley but had mistakenly recounted that Gooch had been with him. The court ignored entirely the equally plausible inference that Hughes was not testifying truthfully or was unable to accurately recall the event. Although the court was correct in stating that Gooch's statement does not directly contradict what Hughes claims to have seen, direct contradiction is not a prerequisite for relief under *Strickland.* The proof on both sides consisted entirely of eyewitness testimony and circumstantial evidence, which made the case essentially a battle of witness credibility. The Tennessee Court of Criminal Appeals applied *Strickland* in an objectively unreasonable manner by holding that Gooch's statement – which, if believed, casts serious doubt upon State star witness Hughes's account of events – did not establish a reasonable probability that, but for Love's failure to

interview Gooch prior to trial, a juror would have found that the State had failed to meet its burden of proof. In short, given the State's lack of physical evidence, the importance of Hughes's testimony to the State's case against Mr. Jackson, and the potential effect Gooch's statement could have had with the jury, it was objectively unreasonable for the Tennessee Court of Criminal Appeals to conclude as it did.

C. "Contrary To" *Strickland*

1. Presentation to the District Court

Petitioner next argues that the state court decision was contrary to the Supreme Court's *Strickland* decision. Holland responds that this court should not consider Jackson's "contrary to" claim because Jackson failed to present it to the district court. In his petition and amended petition, Jackson argued that his counsel had been ineffective without ever mentioning the § 2254(d) standards. The first mention of the § 2254(d) standards in the record before us comes in the district court's summary judgment decision, which rested solely upon the "unreasonable application" prong of § 2254(d)(1). In turn, Petitioner discussed § 2254(d)(1)'s "unreasonable application" prong when seeking a certificate of appealability from the district court without ever referencing the "contrary to" prong. Mr. Jackson later asked this court to expand the certificate of appealability to include three additional claims, but again failed to mention the "contrary to" prong of § 2254(d)(1). Apparently, the first reference to the "contrary to" prong in this case came in Jackson's brief. (*See* Final Brief of Appellant at 17-20.)

"Ordinarily, the courts of appeals do not consider claims or arguments that were not raised in the district court." *United States v. Hayes,* 218 F.3d 615, 619 (6th Cir. 2000). Nonetheless, this court does not adhere to this practice in "'exceptional cases or particular circumstances' or when the rule would produce 'a plain miscarriage of justice.'" *Pinney Dock and Transport Co. v. Penn Central Corp.,* 838 F.2d 1445, 1461 (6th Cir. 1988) (quoting *Hormel v. Helvering,* 312 U.S. 552 (1941)). "[T]o the extent the issue is presented with sufficient clarity and completeness and its resolution will materially advance the . . . litigation," the court of appeals should consider the claim. *Pinney,* 838 F.2d at 1461.

In the present case, Jackson did not discuss any of the § 2254(d) standards when seeking relief in federal district court, and his only references to that subsection's "unreasonable application" prong came in response to the district court's use of the prong. Before that, Jackson simply argued that his trial counsel had been constitutionally infirm. Under these circumstances, and because Jackson's claim that the state court's decision was "contrary to" *Strickland* is fully before this court (*see* Final Brief of Appellant at 17-20; Final Brief of Appellee at 19-20; Final Reply Brief of Appellant at 4-6) and important to the just resolution of this case, we exercise our discretion and consider Jackson's "contrary to" argument.

2. Certificate of Appealability

Pursuant to 28 U.S.C. § 2253, an appeal may not be taken to this court absent a certificate of appealability ("COA"). 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). The COA should issue only if the petitioner has made "a

substantial showing of the denial of a constitutional right" and should specify which issues satisfy this requirement. 28 U.S.C. §§ 2253(c)(2) and (3).

The district court issued the COA with regard to only the unreasonable application prong of 28 U.S.C. § 2254(d)(1). (J.A. at 89.) As previously discussed, Petitioner asked this court to expand the district court's COA to include other claims (a request which we denied), but did not seek that the COA be expanded to include a "contrary to" claim. Notwithstanding these prior omissions, both parties addressed Petitioner's "contrary to" claim in their briefs. (Final Brief of Appellant at 17-20; Final Brief of Appellee at 19-20; Final Reply Brief of Appellant at 4-6.)

A court of appeals has both the power to grant a certificate of appealability where the district court has denied it entirely and the power to expand a district court's grant of a certificate of appealability to include additional issues. *Valerio v. Crawford,* 306 F.3d 742, 763-64 (9th Cir. 2002) (en banc). This power can be invoked in response to a party's specific request for expansion or merely when a party includes in his brief issues that were not specified in the certificate. *Rittenhouse v. Battles,* 263 F.3d 689, 693 (7th Cir. 2001); *see Kincade v. Sparkman,* 117 F.3d 949 (6th Cir. 1997) (construing notice of appeal as request to expand certificate of appealability). Thus, we imply from Jackson's inclusion of the "contrary to" argument in his brief a request to expand the certificate of appealability to include this issue.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel,* 529 U.S. 473,

483 (2000). Under this standard, a petitioner must demonstrate that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack,* 529 U.S. at 484 (quoting *Barefoot v. Estelle,* 463 U.S. 880, 893 n.4 (1983)). The certificate of appealability determination "requires an overview of the claims in the habeas petition and a general assessment of their merit" but "does not require a showing that the appeal will succeed." *Miller-El v. Cockrell,* 537 U.S. 322, 123 S.Ct. 1029, 1039 (2003). This means that the petitioner need not prove "that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that the petitioner will not prevail." *Id.* at 1040. In this manner, the COA inquiry is a separate proceeding that is independent of and distinct from the underlying merits. *Id.* at 1042.

In the instant case, Petitioner has met the COA requirements. Petitioner's claim that the state court's decision was contrary to clearly established federal law arises from the burden of proof articulated in *Strickland v. Washington.* As noted above, *Strickland* requires that a defendant establish a reasonable probability of prejudice. *Id.* at 694. The *Strickland* court described a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Id.* This standard is less demanding than a preponderance of evidence standard. *See Williams v. Taylor,* 529 U.S. 362, 406 (2000) (noting that imposition of preponderance standard in establishing prejudice would be contrary to *Strickland*); *Miller v.*

Straub, 299 F.3d 570, 581 (6th Cir. 2002); *Magana v. Hofbauer,* 263 F.3d 542, 550 (6th Cir. 2001); *Skaggs v. Parker,* 235 F.3d 261, 271 (6th Cir. 2000); *see also Jermyn v. Horn,* 266 F.3d 257, 282 (3d Cir. 2001) (noting that "[t]his standard is 'not a stringent one'").

Mr. Jackson contends that the Tennessee Court of Criminal Appeals applied an incorrect burden of proof in assessing the prejudice component of his claim. Although the court initially quoted the "reasonable probability" language of *Strickland,* it immediately followed this statement with language that "[i]n a post-conviction proceeding, the defendant has the burden of proving his allegations by a preponderance of the evidence." *Jackson v. State,* 1995 WL 747843, at *9. The court later stated "it is asking too much that we draw the inference that the jury *would not have believed* Hughes at all had Melissa Gooch testified." *Jackson v. State,* 1995 WL 747843, at *9 (emphasis added). Furthermore, the state court concluded that Jackson "failed to carry his burden of proving that the outcome of the trial *would probably have been different* but for those errors." *Id.* at *10 (emphasis added).[6] According to Mr. Jackson, this language establishes that the state court shouldered him with an improperly heavy burden. This heavy burden, he avers, is contrary to the Supreme Court's holding in *Strickland. See Magana,* 263 F.3d at

[6] In evaluating Mr. Jackson's contention that the lower court should have reopened the proof in the collateral proceeding to allow Melissa Gooch to testify, the Tennessee Court of Appeals also stated that Gooch's statement "does not lead to the conclusion that the jury *would have decided the case differently* had it heard Gooch testify." *Id.* at *6 (emphasis added).

550 (holding burden of absolute certainty is contrary to *Strickland*).

In *Williams v. Taylor,* the Supreme Court hypothesized about the effect of employing an incorrect burden of proof:

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different."

Williams, 529 U.S. at 405-406 (quoting *Strickland,* 466 U.S. at 694).

In light of this precedent, we are convinced that Petitioner has sufficiently established for COA purposes that his claim is debatable. The Tennessee Court of Criminal Appeals's various descriptions of Mr. Jackson's burden – "the jury *would not have believed* Hughes at all," *Jackson,* 1995 WL 747843, at *9 (emphasis added), "burden of proving that the outcome of the trial *would probably have been different* but for those errors," *id.* at *10 emphasis added) – are sufficiently dissimilar to the correct "reasonable probability" standard of *Strickland* and sufficiently similar to the incorrect standard of *Williams* – "a preponderance of the evidence that the result of his criminal proceeding *would have been* different," *Williams,* 529 U.S. at 405-406 (emphasis added) – to spark debate among

reasonable jurists. Petitioner is therefore entitled to a COA on his "contrary to" claim, and we will expand the district court's COA grant to include this claim.

3. The Merits of the "Contrary To" Claim

Although Mr. Jackson's claim is sufficiently debatable to justify a COA grant, the inquiry does not end there. *See Miller-El,* 123 S.Ct. at 1040, 1042 (claim may be debatable even though all jurists would agree, after full consideration, that claim must fail; COA inquiry is separate and distinct from the underlying merits). Before relief may be granted under § 2254(d)(1)'s "contrary to" prong, Petitioner must establish that the state court arrived at a legal conclusion opposite to that reached by the Supreme Court or that the state court decided his case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams,* 529 U.S. at 412-13.

The Supreme Court, in *Woodford v. Visciotti,* 537 U.S. 19, 123 S.Ct. 357 (2002) (per curiam), recently addressed a factual scenario similar to the case at bar. There, John Visciotti was convicted by a California jury of first-degree murder, attempted murder, and armed robbery. *Id.,* 123 S.Ct. at 358. The same jury sentenced Visciotti to death. *Id.* After exhausting his direct appeal, Visciotti levied a collateral attack in the California Supreme Court. *Id.*

The California Supreme Court denied Visciotti's petition, finding that Visciotti had not been prejudiced by his counsel's alleged deficient performance. *Id.* (citing *In re Visciotti,* 926 P.2d 987, 1004, 1006 (Cal. 1996)). In denying Visciotti's petition, the state court began its analysis of Visciotti's ineffective assistance of counsel claim with the "reasonable probability" criterion from *Strickland,* then

stating that "[t]he question we must answer is whether there is a reasonable probability that, but for counsel's errors and omissions, the sentencing authority would have found that the balance of aggravating and mitigating factors did not warrant imposition of the death penalty" and again citing *Strickland*. *Id.* (citing *In re Visciotti,* 926 P.2d at 1003). Later, the California Supreme Court asked, "Is it reasonably probable that the jury would have reached a more favorable penalty phase verdict had [Visciotti's attorney] represented him with greater competence?" *In re Visciotti,* 926 P.2d at 1004. The court also discussed the need to assess whether the attorney's performance "undermine[d] confidence" in the trial's outcome, *id.* – language that tracks *Strickland's* description of the "reasonable probability" standard. *Woodford,* 123 S.Ct. at 359 (citing *Strickland,* 466 U.S. at 694). Despite these references to *Strickland* and the reasonable probability standard, the California high court on four occasions employed the term "probable" without the modifier "reasonably." *Id.*

Visciotti then brought a § 2254 challenge to his conviction and sentence in federal court. The California district court granted Visciotti relief and the Ninth Circuit affirmed. *Id.* at 358. Both courts' decisions found that the California court's use of the word "probable" to describe the prejudice standard was contrary to the burden of *Strickland*. The Supreme Court, however, reversed:

> The California Supreme Court's opinion painstakingly describes the *Strickland* standard. Its occasional shorthand reference to that standard by use of the term "probable" without the modifier may perhaps be imprecise, but if so it can no more be considered a repudiation of the standard

than can this Court's own occasional indulgence in the same imprecision. *See Mickens v. Taylor,* 535 U.S. 162, ___, 122 S.Ct. 1237, 1241, 152 L.Ed.2d 291 (2002) ("probable effect upon the outcome"); *Williams v. Taylor,* 529 U.S. 362, 393, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) ("probably affected the outcome").

The Court of Appeals made no effort to reconcile the state court's use of the term "probable" with its use, elsewhere, of *Strickland's* term "reasonably probable," nor did it even acknowledge, much less discuss, the California Supreme Court's proper framing of the question as whether the evidence "undermines confidence" in the outcome of the sentencing proceeding. This readiness to attribute error is inconsistent with the presumption that state courts know and follow the law. . . . It is also incompatible with § 2254(d)'s "highly deferential standard for evaluating state-court rulings," *Lindh v. Murphy,* 521 U.S. 320, 333, n.7, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997), which demands that state court decisions be given the benefit of the doubt.

Id. at 360 (string citation omitted).

Here, the Tennessee Court of Criminal Appeals, like the state court in *Visciotti,* articulated the correct prejudice standard from *Strickland*. *Compare Jackson,* 1995 WL 747843, at *9, *with In re Visciotti,* 926 P.2d at 1003. But unlike the California Supreme Court's decision in *Visciotti,* the state court decision at issue here made no further reference to *Strickland* or to its prejudice standard. *Compare Jackson,* 1995 WL 747843, at *9-10, *with In re Visciotti,* 926 P.2d at 1003-06. Instead, the Tennessee appellate court repeatedly referenced a "preponderance of the evidence" – like standard in examining whether

Jackson had been prejudiced by his counsel's performance. *Jackson,* 1995 WL 747843, at *9, *10.

Even keeping mindful of the deferential gaze that we must cast upon the Tennessee Court of Criminal Appeals's decision, *see Woodford,* 123 S.Ct. at 360, we must conclude that the state court merely paid lip service to *Strickland's* reasonable probability standard before imposing an inappropriately stringent burden upon Mr. Jackson. Other than the initial articulation of the *Strickland* standard, there is absolutely no evidence that the state court analyzed Petitioner's claim under the proper "reasonable probability" standard. Indeed, all evidence within the opinion is to the contrary. *See Jackson,* 1995 WL 747843, at *9, *10. A court cannot relieve itself of the duty to apply directly applicable Supreme Court precedent by simply recognizing that that precedent exists. *Cf. Mask v. McGinnis,* 233 F.3d 132, 141 n.5 (2d Cir. 2000) (holding that appellate court's summary recitation of the *Strickland* rule cannot save lower court's inapposite determinations under an incorrect "certainty" standard). Recognition and application are two entirely different actions. Accordingly, the Tennessee Court of Criminal Appeals's act of recognizing the *Strickland* standard while applying a more stringent standard to the case before it requires that we reject the state court's determination as contrary to the rule of *Strickland.*

CONCLUSION

The district court granted summary judgment in favor of Holland because it determined that the state court decision was neither contrary to nor an unreasonable application of *Strickland.* Because the Tennessee Court of

Criminal Appeals both applied a burden of proof contrary to the burden articulated in *Strickland* and unreasonably applied *Strickland's* holding to Jackson's claim, we **REVERSE** the decision of the district court and **REMAND** the case for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JESSIE LAFRANTZ JACKSON, Petitioner	)	
v.	)	No. 3:97-0444
STATE OF TENNESSEE AND FLORA HOLLAND, WARDEN, Respondent.	)	Judge Nixon

ORDER

Pending before the Court are Petitioner's Amended Petition for a Writ of Habeas Corpus, (Doc. No. 26), and Respondents' Motions to Dismiss and for Summary Judgment, (Doc. No. 19). For the reasons set forth in the accompanying Memorandum, the Court hereby GRANTS Respondents' Motion to Dismiss Petitioner's claim of prosecutorial misconduct, DENIES Respondents' Motion to Dismiss portions of Petitioner's ineffective assistance of counsel claim, and GRANTS Respondents' Motion for Summary Judgment. Accordingly, Petitioner's Amended Petition for a Writ of Habeas Corpus is DENIED.

It is so ORDERED.

Entered this 24th day of October, 2000.

/s/ John T. Nixon
JOHN T. NIXON, SENIOR
JUDGE
UNITED STATES DISTRICT
COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JESSIE LAFRANTZ JACKSON, Petitioner	)	
v.	)	No. 3:97-0444
STATE OF TENNESSEE AND FLORA HOLLAND, WARDEN, Respondent.	)	Judge Nixon

MEMORANDUM

Pending before the Court are Petitioner's Amended Petition for a Writ of Habeas Corpus, (Doc. No. 26), and Respondents' Motions to Dismiss and for Summary Judgment, (Doc. No. 19). The Court GRANTS Respondents' Motion to Dismiss Petitioner's claim of prosecutorial misconduct, DENIES Respondents' Motion to Dismiss portions of Petitioner's ineffective assistance of counsel claim, and GRANTS Respondents' Motion for Summary Judgment. Accordingly, Petitioner's Amended Petition for a Writ of Habeas Corpus is DENIED.

I. BACKGROUND

A. Facts

Petitioner, Jesse LaFrantz Jackson, appearing through appointed counsel, brings this action pursuant to 28 U.S.C. § 2254, seeking a writ of habeas corpus against the Respondents, the State of Tennessee and Flora Holland, Warden. Petitioner is currently serving a life

sentence in the State of Tennessee and is incarcerated at the Lois DeBerry facility in Nashville, Tennessee.

The Tennessee Court of Criminal Appeals found the following facts in Petitioner's case:

> On February 2, 1986, Sharon Bryant and her boyfriend, the victim James Crawley, hosted a party at the apartment they shared at the University Court housing project in Nashville, Tennessee. The purpose of the party was to raise money via a card game called "Tonk." The victim needed the money for car repairs. . . .
>
> The party was already in progress when the defendant arrived with the victim at some time between 9:00 and 10:45 p.m. After arriving, the defendant alternated between playing cards and going upstairs with the victim. Ms. Bryant testified that she had heard arguing the last time the defendant was upstairs with the victim, and that she had told them to come back downstairs. When they did, the defendant resumed playing cards. Bryant also testified that the defendant and the victim had both been "high." The defendant denied that he had been arguing with the victim.
>
> After the defendant had resumed playing cards, three more male guests arrived and wanted to play dice. The victim then left, telling Bryant that he was going to get some dice. He also told her, "I have the money to get my car fixed," and patted one of his pockets. The defendant testified that the real reason the victim left was to sell some cocaine. Bryant testified that if

the victim had had the money, it had come from some source other than the card game.[1] Shortly thereafter, the defendant asked Bryant where the victim had gone. She told him that he had gone to get some dice. The defendant then left, leaving some money on the card table. A few minutes later, the victim's cousin came by and told Bryant that her boyfriend had been shot. . . .

Bryant testified that on arriving at the place where her boyfriend was lying, she had seen the victim's aunt, Freddie Davis, Jonathan Hughes and "another guy" there. Then numerous other people arrived. She testified that the defendant had arrived at about the same time as the ambulance. At that point she testified, the defendant had tried to comfort her. She further testified that she had spoken with the defendant after she got back from the hospital and that he had mumbled something that she had thought was, "I didn't mean to do it." She testified that when she had questioned him about this, he said, "They didn't have to do it. They didn't have to kill him. He was too little to get shot. They could have beat him up." She testified that she had then asked him who did it, and he had replied, "They said, Frankenberry did it," and "you know they got into an argument," to which she had replied, "I heard." Bryant also testified that later in the evening she had asked the defendant if the victim had been killed over drugs or money and that

[1] After the victim had been taken to the hospital, his clothing was searched and twenty-five dollars ($25) cash was found. Bryant testified that the victim had needed one hundred dollars ($100) for the car repairs.

he had replied, "No, [it] wasn't about drugs and it wasn't about any money." She had then asked what it was about and he replied, "I'm too upset. I can't talk, I'll come back tomorrow and tell you." Bryant testified that the defendant had not later explained why the victim had been shot, but did deny shooting him.

Jonathan Hughes testified that he had been sitting on a [parked] car . . . when he saw the victim walking down the sidewalk. Hughes testified that the defendant had been walking down the street behind the victim, telling him to "Come here and let me holler at you for a minute." Hughes testified that the victim had responded that he didn't have time, he was looking for his money. According to Hughes, the defendant had continued to follow the victim. Paul Ray Jones, Hughes' cousin, testified that he had been with Hughes and had also seen the defendant and the victim walking down the street.

Hughes testified that Jones had then told him that his girlfriend, Melissa Gooch, wanted to talk to him. At this, Hughes had started down B Street[2] to meet his girlfriend, walking on the opposite sidewalk and somewhat behind the victim and the defendant, but going in the same direction. A short distance later, where B Street intersected A Street, Hughes testified that he and his girlfriend had turned left while the defendant and the victim turned right. He further testified that he and Gooch had then heard two shots, at

[2] The Court of Criminal Appeals assigned the letters "A" and "B" to designate the streets in question as it was unable to determine the correct street name from the trial record.

which they had turned around, looked up A Street, and saw the defendant fire two shots at the victim. Hughes testified that he had then seen the defendant bend down, roll the victim over, and run around the far corner of the building. Hughes testified that he had then gone to where the victim was lying, arriving there after ten or fifteen others had.

Two other witnesses testified that they had seen the defendant running at some distance from the body, but in a direction away from the body, and that he had been trying to hide his face behind his jacket. These sightings were immediately after the shooting, at about 12:30 a.m. The defendant denied taking any such actions. Melissa Gooch was not called to testify by either the defendant or the State.

The defendant denied shooting the victim. He testified that he and the victim had not had an argument that night and that the victim was trying to sell some cocaine. He testified that he had brought a small amount of cocaine to the party as a gift to the host and hostess, but that the victim had wanted to add it to some cocaine he already had and sell the entire amount to a third party. The defendant testified that he had been agreeable to this so long as the victim repaid him a previous ten dollar ($10) loan out of the proceeds. The victim was reluctant to do this because he needed the money for his car.

The defendant testified that he had left the party because two of the three newcomers had "appeared to be gangster[s]," so he had gone to

his pickup truck to get his pistol for protection.[3] On the way back to the apartment from his truck, the defendant testified, he had met the same three men who then told him that the victim had been shot. At that point, the defendant testified, he had walked down to the murder scene, hiding his pistol under a fence on the way. The defendant denied that he had been on the street where Hughes claimed to have seen him.

Freddie Davis testified that he had been walking from his mother's apartment to his sister's apartment when he saw the victim and someone else he couldn't identify walk up to a brown and beige car on A Street. Davis testified that "they was talking for a minute and then the next thing I know the dude just come out of his car and just started shooting." Davis testified that he had then run to his sister's apartment to tell her, and had then gone down to where the victim was lying. The angle of Mr. Davis' view was approximately perpendicular to that of Hughes but, from a review of the exhibits, the jury could reasonably have concluded that the distance of each witness from the scene of the shooting was roughly about the same. Davis testified that the car had taken off and that he was with the victim when he died. Davis also testified that "everybody [had been] saying that Frankenberry had shot" the victim. Davis reported this information to the police, who then put a "pick-up" out on the vehicle. Detective Wynn testified that they had investigated a car that matched

[3] The pistol that the defendant had and which was recovered by the police during a consensual search was not the murder weapon.

the description given and had tried to develop information on a Frankenberry, but that they had not come up with any other indication that Frankenberry had been involved, and had not tied the vehicle to the crime.

Davis also testified that he had not seen Jonathan Hughes at the scene and that the other person who had been with the victim when he was shot had run off. Davis testified that this person had been wearing blue jeans and a gray jacket. The defendant had been wearing red pants on the night in question. Davis admitted on cross examination that he had drunk two to four half-pints that night prior to the shooting. The victim had been shot with a .25 caliber gun and three .25 caliber bullets were recovered from his body. The murder weapon was never found. However, John Crawford testified that he had seen the defendant pull a pistol out from under a car seat nine to ten months before the shooting and that, although he could only see a portion o the pistol because the defendant had had it "cuffed up," he thought it was a .25 caliber pistol. Terry Merrill testified that, after the shooting, he had seen the defendant retrieve a gun from under a fence between two buildings and put it in his pants. The defendant testified that this had been the .22 caliber pistol that he had hidden after learning of the victim's death. The defendant testified that he had never had a .25 caliber gun.

Jackson v. State, 1995 WL 747843, *1-4 (Tenn. Crim. App. 1995).

In his first post-conviction appeal Petitioner alleged that (1) his trial counsel was ineffective because he failed to interview several witnesses prior to the trial; (2) waived

the defendant's preliminary hearing; (3) he failed to file a request for discovery and inspection; (4) he failed to discover one of the investigating officer's reports containing information about another suspect; (5) he made no request for *Jencks* material after the State's witnesses testified; (6) he failed to properly prepare the defendant for his testimony; (7) and he conducted ineffective cross-examinations at trial. *See id.* at *8. Petitioner also included claims that trial counsel failed to move for a judgment of acquittal and failed to have tests conducted on a gun introduced at trial.

Petitioner presented evidence in support of the above allegations at the post-conviction evidentiary hearing. Counsel admitted that he had voluntarily waived a preliminary hearing, although he did not recall why, suggesting that it might have had something to do with a reduced bond. (Doc. No. 5, Add. 1 at 10-11.) Petitioner argued to the post-conviction court that the face of the arrest warrant did not support this supposition and that the issue of a bond was never discussed. (Doc. No. 5, Add. 1 at 10-11.) Counsel stated as justification for waiving the preliminary hearing, that "he didn't think it would hurt . . . there are ways other than a preliminary hearing, to get the information necessary to try the case." (Doc. No. 5, Add. 1 at 10-11.) Counsel did not file a Discovery Motion in the case and instead relied solely upon a conversation with the prosecutor and a review of the file, in order to find out the information he needed. (Doc. No. 5, Add. 1 at 10-11.) Petitioner submitted that trial counsel did not take notes on the documents reviewed. (Doc. No. 5, Add. 1 at 11.) Petitioner presented evidence that counsel did not investigate the State's witnesses or the other possible witnesses that the State's files or discussions with witnesses would

have revealed. None of the State's witnesses could recall speaking with trial counsel before the trial. Trial counsel could not recall interviewing any witnesses prior to trial. (Doc. No. 5, Add. 1 at 12.) Petitioner presented evidence that trial counsel had been on vacation for the four days prior to commencement of his trial and that counsel had mistakenly thought that the trial was to be continued. (Doc. No. 5, Add. 1 at 9-10.) Petitioner contended that his attorney was not adequately prepared for trial and that he and counsel did not discuss possible questions that would be asked on direct or cross examination. (Doc. No. 5, Add. 1 at 14-15.) Trial counsel did not request *Jencks* material at trial although some did exist. (Doc. No. 5, Add. 1 at 14.) The State Court of Criminal Appeals found the following facts in its review on post-conviction:

> The lower court conducted a bifurcated evidentiary hearing on the defendant's claim on two different days separated by approximately ten months. On the first day, the State offered the testimony of Mr. Douglas Love, the defendant's trial counsel. On the subsequent hearing day, the defendant offered testimony from Mr. Love; Detective Terry McElroy; Jonathan Hughes; Sharon Bryant; Ethel Robertson; and himself.
>
> [At the hearing] Mr. Love testified that he had been licensed to practice in the State of Tennessee in 1979 and that he had been practicing primarily criminal law in this state since that time. The defendant hired Mr. Love to represent him in the trial of this matter. Mr. Love testified that he had met with the defendant in his office "at least a half a dozen" times, discussing matters for fifteen to thirty minutes on each occasion. Mr. Love also went out with the defendant to University Court at least twice where Mr.

> Love viewed the relevant area and drew two diagrams. The defendant told Mr. Love the names of several witnesses, which Mr. Love wrote down, including Freddi Davis and Sharon Bryant. Although the record is clear that Mr. Love spoke with Davis prior to the trial, it is unclear whether he spoke with Bryant. Mr. Love also testified that he and the defendant had discussed the defendant's own testimony and the nature of anticipated cross-examination, although they did not go through a "formal rehearsal." Mr. Love testified that he had felt adequately prepared when they went to trial.
>
> Mr. Love explained that he had not filed a request for discovery and inspection because he had discussed the case with the State's attorney at least twice and had had an opportunity to review the State's file which, apparently, contained transcripts of the statements made to the police by Hughes, Bryant, Mark Crawford and Bryant's sister. Although he admitted that he had not spoken with Hughes prior to the trial, he testified that he felt that he had gotten what information he needed about Hughes' anticipated testimony from the State.
>
> Although Mr. Love could not remember specifically why the preliminary hearing was not had in this matter, he testified that he assumed it had been waived to get a favorable bond reduction, and that he thought there were ways other than a preliminary hearing to "get the information necessary to try a case." There is no proof in the record that Mr. Love would have obtained information at the preliminary hearing that he could have used to the defendant's advantage at trial.

> In support of his habeas petition, Petitioner has submitted addenda including a sworn statement by Melissa Gooch in which she states that she was not with Mr. Hughes on the night in question and did not see Petitioner shoot the victim.

Jackson, 1995 WL 747843 at *8-9.

In support of the instant habeas petition, Petitioner has also submitted police investigative reports of the crime in which several versions of the events of the crime are presented. (Doc. No. 18, Add. 2-11.) Included in these documents is the report of Detective Terry McElroy, who stated that he had obtained from an [sic] reliable source information that the person who did the shooting "was wearing a panama-type straw hat, and had on light brown short sleeve sweater with a beige color stripe going around it." (Doc. No. 18, Add. 5.) Other reports indicate conflicting statements as to the location of Mr. Hughes when the crime occurred. (Doc. No. 18, Add. 2, 3, 4, 8, 9.)

B. Procedural History

Petitioner was convicted of first degree murder and acquitted of the crime of concealing stolen property by a jury in Criminal Court of Davidson County, Tennessee on March 16, 1987. Petitioner was sentenced to life in prison. *Jackson*, 1995 WL 747843, *4. On April 15, 1987, Petitioner's newly retained counsel, filed a Motion for a New Trial alleging that the evidence was insufficient to support the jury's verdict. This motion was overruled after a hearing. *See id.*

Petitioner filed a Notice of Appeal on August 25, 1987. This appeal was dismissed in May 1988, at the request of the Petitioner and his counsel. *See id.*

On March 29, 1989, Petitioner filed his Petition for Post-Conviction Relief, claiming ineffective assistance of trial counsel. On February 19, 1991, Petitioner filed an Amendment to Petition for Post-Conviction Relief. On January 26, 1993, before the lower court issued its order denying the initial petition, Petitioner filed an Amended Petition for Post Conviction Relief. *See id.* at *4-5. On July 28, 1994, the lower court entered an order denying post-conviction relief. On August 8, 1994, Petitioner filed his Notice of Appeal with regard to the denial of his Petition for Post Conviction Relief. On the same date, Petitioner filed a Motion for Hearing in the Nature of a Motion for a New Trial, alleging newly discovered evidence requiring an evidentiary hearing and reopening of the proof. The newly discovered evidence consisted of the testimony of Melissa Gooch, a "missing" witness. The lower court denied this motion on August 15, 1994. *See id.* at *5.

On December 19, 1995, the Court of Criminal Appeals affirmed the lower court's denial of post-conviction relief, holding that the lower court properly exercised its discretion when it refused to grant Petitioner a new trial or reopen proof. *See id.* at *6. The State appellate court found that Petitioner had already had a hearing on his first motion for a new trial and did not get a second chance to argue this issue. *See id.* at *5. The court also determined that Petitioner's claim that a "missing witness" who had recently been found was not sufficient to justify reopening proof where Petitioner had known the witness's name at trial, Petitioner did not provide a supporting affidavit from the witness and cited no authority to support reopening

proof in his case. *See id.* The Court also held that construing the pleading as a writ of error *coram nobis* was not helpful to Petitioner as the claim was not timely filed and he failed to satisfy the requirement of the writ that an affidavit in support of the petition be filed. *See id.* at *3-5. The court further determined that the evidence was sufficient to establish the elements of premeditation and deliberation, and that the jury instruction in Petitioner's case was a correct statement of the law in Tennessee at the time of his trial. *See id.* at *8. With respect to Petitioner's claim of ineffective assistance of trial counsel, the court determined that "[e]ven if, *arguendo*, Mr. Love was negligent . . . ," Petitioner had not established that this negligence prejudiced him. *See id.* at *10.

On February 20, 1996, Petitioner filed an application for permission to appeal to the Tennessee Supreme Court. (Doc. No. 5, Add. 7.) The Supreme Court denied the application on June 10, 1996.

Petitioner filed a second petition for post-conviction relief on March 31, 1997. (Doc. No. 21, Add. 1 at 2.) In this petition he alleged that the prosecution failed to disclose evidence favorable to him and that there was newly discovered evidence in the case. On May 28, 1997, the lower court summarily dismissed Petitioner's second post-conviction petition, and Petitioner filed a Notice of Appeal. The Court of Criminal Appeals affirmed the decision of the lower court and dismissed the petition on November 13, 1997, holding that the petition was time-barred by the three year statute of limitations that was in effect when Petitioner's conviction became final. (Doc. No. 21, Add. 1 at 3.) The Tennessee Supreme Court denied Petitioner's application for permission to appeal on March 8, 1999.

Jackson v. State, 1998 WL 754941 (Tenn. Crim. App. 1999).

Petitioner filed the instant habeas corpus action in this Court on April 23, 1997. (Doc. No. 1.) Respondent filed motions to dismiss and for summary judgment on July 9, 1997. (Doc. No. 3.) After appointment of the Federal Public Defender as counsel to Petitioner, by Order of this Court, Respondent's motion to dismiss was denied without prejudice to be renewed if necessary after filing of Petitioner's amended petition. (Doc. No. 9.) The petition was held in abeyance upon request of counsel in order for Petitioner to exhaust his State remedies. (Doc. No. 16.) By a motion dated November 11, 1999, Petitioner requested that his case be returned to active docket and sought leave to file an amended petition. Leave was granted by Order of this Court on January 10, 2000. (Doc. No. 25.) Petitioner filed an Amended Petition for a Writ of Habeas Corpus. (Doc. No. 26) Respondents filed renewed Motions to Dismiss and for Summary Judgment. (Doc. No. 19.) Petitioner's claims as characterized by Respondents, (Doc. No. 22), and ratified by Petitioner in his Response to Respondents' Rule 8 Statement of Material Fact, (Doc. No. 24), allege the following: (1) his trial counsel was ineffective; (2) his post-conviction counsel was ineffective; (3) the post-conviction court violated his Fifth Amendment right to due process by refusing to hear the testimony of a "missing" witness and to grant his motion for a new trial; (4) the jury instruction on premeditation was unconstitutional; (5) the evidence was insufficient to support the jury's verdict; and (6) the State withheld exculpatory evidence and allowed witnesses to testify falsely.

II. DISCUSSION

A. Legal Standard

1. Habeas Corpus

Federal habeas review of a State court's decision is governed by the standards established by the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"). *See Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir.1997); *West v. Seabold*, 73 F.3d 81, 84 (6th Cir.1996). Under the AEDPA, an application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a State conviction cannot be granted with respect to any claim that was adjudicated on the merits in State court unless the adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

The Supreme Court has set forth the standard of review that a Federal habeas court must apply under § 2254(d) in *Williams v. Taylor*, ___ U.S. ___, 120 S.Ct. 1495 (2000). The *Williams* Court held that a decision of the State court is "contrary to" clearly established Federal law "if the State court arrives at a conclusion opposite to that reached by this Court on a question of law or if the State court decides a case differently than this Court has on a set of materially indistinguishable facts." *Id.* at 1523. The Court further held that an "unreasonable application" occurs when "the State court identifies the correct legal principle from this Court's decision but unreasonably

applies that principle to the facts of the prisoner's case." *Id.* A Federal habeas court may not find a State adjudication to be "unreasonable" "simply because that court concludes in its independent judgment that the relevant State-court decision applied clearly established Federal law erroneously or incorrectly." *Id.* at 1522. The Sixth Circuit in *Harris v. Stovall*, 212 F.3d 940, 942-43 (6th Cir2000), determined that its prior reliance on the standard of review in habeas cases articulated in *Nevers v. Killinger*, 169 F.3d 352 (6th Cir.), cert. denied, 527 U.S. 1004, (1999), was no longer correct in light of *Williams*. The *Harris* court stated that it would rely solely on *Williams* for the appropriate standard under § 2254(d). 212 F.3d at 943.

2. Motion for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides in part that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The Advisory Committee for the Federal Rules has noted that "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Mere allegations of a factual dispute between the parties are not sufficient to defeat a properly supported summary judgment motions [sic]; there must be a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A genuine issue of material fact is one

which, if proven at trial, would result in a reasonable jury finding in favor of the non-moving party. *See id.* at 247-48. The substantive law involved in the case will underscore which facts are material and only disputes over outcome determinative facts will bar a grant of summary judgment. *See id.* at 248.

While the moving party bears the initial burden of proof for its motion, the party that opposes the motion has the burden to come forth with sufficient proof to support its claim, particularly when that party has had an opportunity to conduct discovery. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Thus, the non-movant may not rely solely on conclusory allegations, but rather must come forward with affirmative evidence which establishes its claims and raises an issue of genuine material fact. *See id.* at 324. It is true, however, that in ruling on a motion for summary judgment, the Court must review the facts and reasonable inferences to be drawn from those facts in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated. *See Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425, 427 (6th Cir.1962).

3. Motion to Dismiss

A motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests whether a cognizable claim has been pled in the complaint. *See Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir.1988). The standard for reviewing a Fed.R.Civ.P. 12(b)(6) dismissal is that the factual allegations in the complaint must be regarded

as true, and "the claim should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (*quoting Windsor v. Tennessean*, 719 F.2d 155, 158 (6th Cir.1983)). When a motion to dismiss is accompanied by matters outside the pleadings, the district court may exercise its discretion to consider such matters and decide the motion as one for summary judgment under Fed.R.Civ.P. 56. *See Scheid*, 859 F.2d at 436.

B. Analysis

1. Ineffective Assistance of Counsel Claims

a. Ineffective Assistance of Trial Counsel

Petitioner first argues that he was denied effective assistance of trial counsel in violation of his Fifth, Sixth and Fourteenth Amendment rights. (Doc. No. 26 at 7-9.) Petitioner argues that but for counsel's errors, a reasonable probability exists that the outcome of the proceedings would have been different. (Doc. No. 26 at 7-9.) A summary of the counsel's alleged errors includes:

a. Failure to file a Request for Discovery and Inspection, failure to request exculpatory evidence from the government.

b. Failure to adequately investigate the facts surrounding the alleged murder including: failure to interview essential witnesses; failure to contact or subpoena an eyewitness, Melissa Gooch, that Petitioner requested counsel to contact; and failure to test gun introduced into evidence.

c. Failure to prepare adequately for trial including: Counsel on vacation prior to trial so did

not meet with or prepare defendant for trial. Failure to prepare defendant for direct or cross examination. Failure to develop a line of questions for direct or cross examination.

d. Failure to request *Jencks* material.

e. Failure to move for a Judgment of Acquittal upon conclusion of the State's presentation of evidence.

(Doc. No. 26 at 7-9.)

Respondents argue that two of Petitioner's ineffectiveness claims were not presented in State court and are thus procedurally defaulted under Tennessee law and should be dismissed by this court absent a showing of good cause for the default and resulting actual prejudice to his Constitutional rights. (Doc. No. 20 at 9-11.) The two claims that Respondents argue were not adequately presented to the State courts are (1) that counsel failed to move for a judgment of acquittal at the conclusion of the State's burden of proof on the insufficiency of the evidence; and (2) that counsel did not test the gun in question. (Doc. No. 20 at 9).

Respondents argue that they are entitled to summary judgment as a matter of law on the remaining ineffectiveness of trial counsel claims because the State courts have fully adjudicated Petitioner's claims in a manner consistent with the facts and with a reasonable application of Federal constitutional law. (Doc. No. 20 at 13.) Respondents argue that the determinations of factual issues made by a State court shall be presumed correct and that Petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence under 28 U.S.C. § 2254(e). (Doc. No. 20 at 13.) Respondents argue

that although the Court of Criminal Appeals in Petitioner's case observed that Petitioner's trial counsel "made errors both before and during his trial in satisfaction of the first prong of the *Strickland* test," the appellate court went on to find that Petitioner was unable to establish any prejudice from his counsel's performance. (Doc. No. 20 at 14.) Respondents also point out that with respect to the claim that trial counsel was ineffective for failing to file a request for discovery and inspection, the appellate court found that Petitioner had not demonstrated that counsel's performance was deficient. (Doc. No. 20 at 14.) On the basis of these State court findings, Respondents argue that Petitioner's ineffectiveness claims were adjudicated on the merits and cannot be reviewed by this Court absent a showing that "the adjudication of the claim (1) resulted in a decision that is contrary to, or involved an unreasonable application of clearly established Federal law, . . . or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). (Doc. No. 20 at 16.)

Petitioner argues in reply that the ineffective assistance of counsel that he received on each level of his State court proceedings provides the "cause" necessary to excuse the default of his ineffective assistance sub-claims. Petitioner also argues that summary judgment should not be granted on the issue of ineffective assistance of counsel because the State court's determinations are not supported by the record and resulted in a decision clearly contrary to established principles under the Sixth Amendment to the United States Constitution. (Doc. No. 23 at 3.)

AEDPA amended § 2254(d) to place "a new constraint on the power of a Federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." *Williams*, 120 S.Ct. at 1523. Applying the holding in *Williams* to this case, this Court finds that the State court correctly identified that *Strickland* provided the governing legal principles for deciding an ineffectiveness claim and correctly articulated the *Strickland* standard. *Jackson*, 1995 WL 747843 at *9. The State court's conclusion is not opposite to one reached by the United States Supreme Court on the question of effective assistance of counsel, nor has the State court decided Petitioner's case differently than a Supreme Court case with a set of materially indistinguishable facts. The Court disagrees with the State court's finding that Petitioner did not suffer prejudice from his counsel's deficient performance. The Court finds that the State court did not correctly determine the issue of prejudice but the Court does not find that the State court *unreasonably* applied the legal principles to the fact in the prisoner's case.

A criminal defendant has a Sixth Amendment right to receive effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). The test for determining whether a criminal defendant was denied effective assistance of counsel is two-pronged. A reviewing court first ascertains whether counsel's performance was professionally deficient and second determines whether counsel's alleged deficiency prejudiced the defense so as to deprive the defendant of a fair trial. *See Strickland*, 466 U.S. at 687; *Rickman v. Bell*, 131 F.3d 1150, 1154 (6th Cir.1997); *Gravley v. Mills*, 87 F.3d 779, 785 (6th Cir.1996). Both prongs of the *Strickland* test must be

satisfied in order for Petitioner to make a successful Federal ineffectiveness claim. *See Smith v. Robbins*, 120 S.Ct. 746, 766 (2000). Although State court factual findings are entitled to a presumption of correctness under 28 U.S.C. § 2254(d), the question of effectiveness of counsel is a mixed question of law and fact which is subject to a de novo review by this Court. *See Strickland*, 466 U.S. at 698; *United States v. Jackson*, 181 F.3d 740, 744 (6th Cir.1999). A State court's legal conclusion that a habeas petitioner failed to show prejudice from alleged constitutional error of effective assistance of his counsel would be reviewed de novo, absent any credibility determination or other apparent finding of fact. *See Moore v. Carlton*, 74 F.3d 689 (6th Cir. 1996).

i. The Performance Prong

In assessing counsel's performance, a reviewing court must inquire whether "counsel's representation fell below an objective standard of reasonableness," as measured by "prevailing professional norms." *Rickman*, 131 F.3d at 1154 (*quoting Strickland*, 466 U.S. at 687-88). Mere attorney ignorance or inadvertence will not constitute "cause" unless the error rises to the level of a constitutional violation. *See Coleman v. Thompson*, 501 U.S. 722, 752-55 (1991). In assessing counsel's performance, a reviewing court must be highly deferential. *See Strickland*, 466 U.S. at 689. The court must determine whether under the circumstances counsel's allegedly unreasonable acts or omissions "were outside the wide range of professionally competent assistance." *Id.* at 690. While strategic choices made after thorough investigation are generally considered within the range of competent assistance, "counsel has a duty to make reasonable investigations or

to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. *See also Martin v. Rose*, 717 F.2d 295 (6th Cir. 1983) (counsel ineffective where failed to interview alibi witnesses and unaware of investigative file prepared by public defender); *United States v. Goodwin*, 531 F.2d 347 (6th Cir.1976) (counsel ineffective where misunderstood elements of offense and examined client at preliminary hearing in such a manner that client inadvertently confessed).

Because the standard for measuring attorney performance is "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688, trial counsel in this case was bound by a standard of care applicable when this case was tried in 1987, in Davidson County, Tennessee. The Tennessee Supreme Court established the standard applicable at that time in *Baxter v. Rose*, 523 S.W.2d 930 (Tenn.1975). In *Baxter*, the court stated that attorney competence would be measured under the "duties and criteria" set forth in *United States v. DeCoster*, 487 F.2d 1197 (D.C.Cir.1973); the Sixth Circuit standard established in *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir.1974); and the American Bar Association Standards relating to the Administration of Criminal Justice, particularly those portions of the Standards relating to the "Defense Function." *Baxter*, 523 S.W.2d at 936.

The *Baxter* court therefore adopted the Sixth Circuit's requirement that defense counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law; conscientiously protect his client's interest, undeflected by conflicting considerations; and investigate all apparently substantial defenses available to the defendant and assert them in a proper and timely manner. *See id.* at 935 (*citing Beasley*, 491 F.2d at 696). Moreover, the

court adopted the following explanation of counsel's duties from *DeCoster*:

> Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. . . . [T]he adversary system requires that "all available defenses are raised" so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research.

Baxter, 523 S.W.2d at 933 (*citing DeCoster*, 487 F.2d at 1204 (citation omitted)).

Respondents acknowledge in their motion for summary judgment that the Court of Criminal Appeals observed that "petitioner's trial counsel 'made errors both before and during his trial in satisfaction of the first prong of the *Strickland* test." This Court agrees with the Tennessee Court of Criminal Appeals that Petitioner's counsel provided deficient assistance of counsel. The Court finds that trial counsel's failure to investigate the case, failure to interview the State's witnesses and other potential witnesses, failure to impeach the State's witnesses and failure to present information to the jury that would establish the credibility of Mr. Davis version of the facts, fell below the reasonable standard of professional norms in Davidson County, Tennessee at the time of Petitioner's trial.

As to Respondents' argument that Petitioner has defaulted two of his ineffectiveness sub-claims, the Court finds that these issues were properly presented to the State courts and are not procedurally barred. In the record the Court finds that Petitioner elaborated on his initial post-conviction claim of ineffective assistance of counsel by filing an amended petition. In this amended petition he raised his *Jencks* claim and the claims that counsel failed to move for a judgment of acquittal and failed to have the gun introduced at trial tested. As the State courts and Respondents have treated the *Jencks* claim as properly preserved and presented, the other claims are equally preserved.

ii. Prejudice

The "prejudice" component of the claim "focuses on the question of whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364 (1993). To establish prejudice, a defendant must demonstrate a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Rickman*, 131 F.3d at 1155 (*quoting Strickland*, 466 U.S. at 693-94). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *See Carter v. Bell*, 218 F.3d 581 (6th Cir. 2000) (*citing Strickland*, 466 U.S. at 693-94). Prejudice is presumed, in three categories of cases: when a defendant demonstrates actual conflicts of interest that compromise an attorney's ability to advocate his client's interests (*see Strickland*, 466 U.S. at 692); when counsel is completely denied due to absence at a critical stage of a trial (*see United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984)), or

when "various kinds of State interference with counsel's assistance" can warrant a presumption of prejudice. *See Robbins*, 120 S.Ct. at 765.

The Court, while giving deference to the findings fact of the Tennessee Court of Criminal Appeals, disagrees with the State court's holding that the deficiency of counsel received by Petitioner did not prejudice the outcome of his case. Petitioner's case does not fall into one of the three categories where prejudice will be presumed; however, this Court finds that Petitioner has presented sufficient evidence to demonstrate a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Rickman*, 131 F.3d at 1155 (*quoting Strickland*, 466 U.S. at 693-94). Petitioner has demonstrated a probability sufficient to undermine this Court's confidence in the outcome of his case.

The Court finds that the Tennessee Court of Criminal Appeals decision was based on an incorrect application of clearly established Federal law, as determined by the Supreme Court of the United States; however, the error in the holding does not rise to the level of being "unreasonable" that 28 U.S.C. § 2254(d)(1) requires.

The facts presented in Petitioner's post-conviction proceedings indicate that Petitioner's trial counsel did not undertake to conduct any meaningful pre-trial discovery or investigation and as a result did not present defense witnesses, impeach prosecution witnesses or adequately present defendant's alternative theory of the case. This complete failure in defense counsel's obligations to his client meant that the credibility of the State's primary witness was not seriously challenged by presentation of the conflicting accounts of the facts that emerge from the

investigative reports or by the testimony of Melissa Gooch. Although Ms. Gooch's statement was not properly before the State appellate court, the court did know of the existence of this statement and that it would likely raise a reasonable doubt in the mind of the jury. *See Jackson*, 1995 WL 747843 at *2. Trial counsel's failure to adequately present the evidence of the conflicting accounts of the crime to the jury did not competently challenge the State to prove its circumstantial case beyond a reasonable doubt and thus prejudiced Petitioner.

The Petitioner has not presented to this Court the transcripts from the trial or the post-conviction evidentiary hearings so this Court is unable to refer to these records in making its determination of prejudice. In light of the evidence presented to this Court, the State Court of Criminal Appeals' determination that prejudice had not been proved cannot be found unreasonable. The state court determined that Petitioner had not demonstrated to the court that had counsel been more diligent that counsel would have discovered evidence that would case [sic] grave doubt on the testimony of Mr. Hughes or would exculpate Petitioner. The state court found that the testimony of Ms. Gooch was never effectively produced for the court and the content of her statement that was summarized for the court, while casting doubt on Mr. Hughes credibility did not rise to the level of contradicting what he had seen. Although the State court does not adequately take into account the weakness of the State's circumstantial case against Petitioner and the number of conflicting accounts of events that existed in the State's files and that effective defense counsel could have used to create a reasonable doubt in the mind of a jury, the Court's decision is logical and not unreasonable. Therefore; Respondent's motion of

summary judgment is granted on Petitioner's claim of ineffectiveness of trial counsel.

b. Ineffective Assistance of Post-Conviction Counsel.

Petitioner's second claim is that he was denied effective assistance post conviction counsel because counsel failed to investigate his claims and failed to contact the witness, Melissa Gooch, despite Petitioner's repeated requests. (Doc. No. 26 at 9-10.)

Respondents correctly argue that Petitioner's second claim should be dismissed because there is no Federal constitutional right to post-conviction proceedings and cites *Ritchie v. Eberheart*, 11 F3d 587, 591-92 (10th Cir. 1993), and 28 U.S.C. § 2254(i), for this proposition (Doc. No. 20 at 8.)

Petitioner argues in reply to Respondents' motion to dismiss, that since Petitioner is entitled to effective assistance of counsel in at least one appeal as of right, he should be permitted to raise this claim for the first time in his Federal habeas petition. (Doc. No. 23 at 1.) Petitioner argues that despite the general rule that there is no constitutional right to counsel in State post-conviction or habeas proceedings, *Pennsylvania v. Finley*, 481 U.S. 551 (1987), if a constitutional claim can only be brought for the first time in post-conviction, an exception to this rule should apply. (Doc. No. 23 at 1-2.) Petitioner further argues that with respect to issues – such as ineffective assistance of counsel – which are not directly appealable, the constitutional right to appellate counsel should extend to effective assistance of counsel in State post-conviction

proceedings. (Doc. No. 23 at 2.) Petitioner also argues that his ineffectiveness claims, based on performance of trial and appellate counsel, could have practicably been addressed only in his State post-conviction petition. (Doc. No. 23 at 2.) That Petitioner's attorneys failed to raise these ineffectiveness claims during post-conviction proceedings constitutes "cause" excusing procedural default. *Clay v. Director,* 749 F.2d 427, 430-32 (7th Cir. 1984). (Doc. No. 23 at 2.)

28 U.S.C. § 2254(i) states "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under § 2254." In light of the clear language of § 2254(i), Petitioner's second claim of ineffectiveness of post-conviction counsel is without merit and is dismissed.

2. Motion to Reopen Proof

Petitioner's third claim is that the post-conviction court violated his Fifth Amendment right to due process by refusing to hear the testimony of a "missing" witness and to grant his motion for a new trial. (Doc. No. 26 at 10-11.) Petitioner asserts that although he repeatedly requested his trial and post-conviction attorneys to locate an eyewitness, Melissa Gooch, it was only after he hired his own private investigator to locate her that he was able to secure her testimony. (Doc. No. 26 at 10-11.)

Respondents acknowledge that Petitioner's motion to reopen proof is exhausted but contend that the State courts rejected the claim on State law procedural grounds and there for [sic] summary judgment should be granted. Respondents argue that the State court found Petitioner's

motion to be untimely filed seven years after his jury conviction and six years after he withdrew his direct appeal. (Doc. No. 20 at 17.) Respondent's argue that the court further determined that treating the pleading as a writ of error *corum nobis,* pursuant to Tenn. Code Ann. § 27-7-103, was improper because it was untimely filed and unaccompanied by an affidavit as required by statute. (Doc. No. 20 at 17.)

Petitioner argues that his claim that the State post-conviction court violated his Fifth Amendment right to due process by refusing to reopen the proof to permit testimony by a witness not present at trial, was not addressed on the merits at the State level and is therefore not ripe for summary judgment. (Doc. No. 23 at 6.)

28 U.S.C. § 2254(a) states that a Federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The writ, traditionally, has been available when the petitioner is in custody or threatened with custody and the detention is related to a claimed constitutional violation. *See Kirby v. Dutton*, 794 F.2d 245 (6th Cir. 1986); *Sherley v. Parker*, 2000 WL 1141425, *6 (6th Cir. 2000) (refusing to hear claim that State court failed to hold requested evidentiary hearing, reserving writ for constitutional errors underlying the conviction itself, *citing Kirby*, 794 F.2d at 246-47). In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the Supreme Court analyzed the scope of the applicability of the writ of habeas corpus, stating:

> It is clear, not only from the language of ... § 2254(a), but also from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody.

Id. at 484.

The Sixth Circuit and a majority of other circuits have concluded, in agreement with *Preiser*, that the writ is not the proper means by which prisoners should challenge errors or deficiencies in State post-conviction proceedings because the claims address collateral matters and not the underlying State conviction giving rise to the prisoner's incarceration. *See e.g. Ortiz v. Stewart*, 149 F.3d 923, 939 (9th Cir. 1998), cert. denied, ___U.S.___, 119 S.Ct. 1777, 143 L.Ed.2d 806 (1999); accord, e.g., *Trevino v. Johnson*, 168 F.3d 173, 180 (5th Cir. 1999); *Roberts v. Champion*, 131 F.3d 152 (table), 1997 WL 741166 at *3 (10th Cir. 1997), cert. denied, 523 U.S. 1127 (1998); *Villafuerte v. Stewart*, 111 F.3d 616, 632 n. 7 (9th Cir. 1997) (claim that the petitioner was denied due process in State habeas proceeding is "not addressable in a section 2254 proceeding"), cert. denied, 522 U.S. 1079 (1998); *Montgomery v. Meloy*, 90 F.3d 1200, 1206 (7th Cir.) (per curiam) ("Unless State collateral review violates some independent Constitutional right, such as the Equal Protection Clause, ... errors in State collateral review cannot form the basis for Federal habeas corpus relief."), cert. denied, 519 U.S. 907 (1996); *Nichols v. Scott*, 69 F.3d 1255, 1275 (5th Cir. 1995) ("[E]rrors in a State habeas proceeding cannot serve as a basis for setting aside a valid original conviction. An attack on a State habeas proceeding does not entitle the

petitioner to [Federal] habeas relief in respect to his conviction, as it 'is an attack on a proceeding collateral to the detention and not the detention itself.'"), cert. denied, 518 U.S. 1022 (1996). *But see Dickerson v. Walsh*, 750 F.2d 150, 152-54 (1st Cir. 1984). In light of the above Sixth Circuit and Supreme Court precedent, habeas corpus does not apply to Petitioner's claim that the State post-conviction court abused its discretion when it refused to reopen Petitioner's case to hear new evidence. Therefore, summary judgment is granted on the claim that the post-conviction court violated Petitioner's Fifth Amendment procedural rights.

3. Jury Instruction

Petitioner's fourth claim is that the trial court gave an unconstitutional jury instruction on premeditation, when it instructed the jury that the premeditation may be formed in an instant. (Doc. No. 26 at 11-12.) Petitioner argues that this instruction is contrary to Tennessee law as articulated in *State v. Brown*, 836 S.W.2d 530, 543 (Tenn. 1992) (stating that the deliberation necessary to establish first-degree murder cannot be formed in an instant). Petitioner argues that the instruction given in his case improperly misstated the prosecution's burden of proof on the element of premeditation. (Doc. No. 26 at 10-11.)

Respondents argue correctly that they are entitled to summary judgment on this claim because the Tennessee courts have held that *Brown*, decided five years after Petitioner's conviction, does not apply retroactively and that the jury instruction in Petitioner's case was a correct

statement of the law at the time of his trial. (Doc. No. 20 at 19-20.)

The Tennessee State courts have repeatedly held that *Brown* does not apply retroactively, and that the jury instruction was not an inaccurate statement of Tennessee law at the time it was given. *See Lofton v. State*, 898 S.W.2d 246 (Tenn. Crim. App. 1994). The State court of Criminal Appeals has held that "the mere fact that [the] instruction has been abandoned . . . does not necessarily mean that its previous use equated with a due process violation" cognizable in a post-conviction proceeding. *Id.* at 249 (*citing Slate v. State*, 1994 WL 149170 (Tenn. Crim. App. 1994). The Tennessee appellate courts have determined that the State Supreme Court in *Brown* did not hold that the disfavored instruction on premeditation violated a constitutional right, but merely "that it is prudent to abandon an instruction that tells the jury "that 'premeditation may be formed in an instant.' Such an instruction can only result in confusion, given the fact that the jury must also be charged on the law of deliberation." *Lofton*, 898 S.W.2d at 249.

The Sixth Circuit has applied a high standard to habeas Petitioner's claims of unconstitutional jury instruction. *See Byrd v. Collins*, 209 F.3d 486, 527 (6th Cir. 2000). Indeed, "the fact that the instruction was allegedly incorrect under State law is not a basis for habeas relief." *Id.* at 527 (*citing Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991)). The sole question on habeas is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. *See Byrd*, 209 F.3d at 527 (citation omitted). Moreover, the Supreme Court has cautioned that it has "defined the category of infractions that violate 'fundamental fairness' very narrowly." *Id.* at

527 (*citing Dowling v. United States*, 493 U.S. 342, 352 (1990)). The Supreme Court in *Estelle*, emphasized that it is not the province of a Federal habeas court to reexamine State-court determinations on State-law questions. In conducting habeas review, a Federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. *Estelle*, 502 U.S. at 68.

On habeas review, this Court will considers [sic] claims of constitutional errors in jury instructions de novo. *See id.; see also Esquibel v. Rice*, 13 F.3d 1430, 1431 (10th Cir. 1994). An error in describing an element of the crime is a "trial error," not a "structural error." *California v. Roy*, 519 U.S. 2, 5 (1996). Therefore, the error is subject to a harmless-error analysis. *See id.* The harmless-error inquiry is "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (*quoting Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Applying this standard to a habeas proceeding, harmless error will be found where the Federal reviewing judge "is in grave doubt about whether a trial error of Federal law" affected the verdict. *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

In this case, although the trial court did give what was later determined to be a confusing instruction to the jury in Petitioner's case, viewed as a whole, the error in the instruction was harmless. The instruction was not prejudicial to Petitioner because it did not impair his theory of the case and there were sufficient facts for a reasonable jury to conclude that the elements of premeditation and deliberation were satisfied. Petitioner's theory of the case at trial appears to have been that he was not

the killer and that some other person had committed the crime. Petitioner did not provide an alternative defense that his actions were made without premeditation. At trial, evidence was presented that several minutes elapsed between when the victim left Ms Bryant's home, and when Petitioner left the home and the victim was killed. There was also evidence that Petitioner and the victim had an argument before the victim left the house and that witnesses identified Petitioner as the person who shot the victim. On this evidence, once Petitioner's theory of the case was rejected, a jury could reasonably find that Petitioner had sufficient time to allow for the deliberation necessary to form the requisite premeditated intent for first-degree murder. After reviewing the record, the Court concludes that the erroneous jury instruction on the element of premeditation did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637; *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998). The Court is not left in grave doubt about the trial court's error; therefore the error is harmless. *See O'Neal*, 513 U.S. at 436. *See also Alley v. Bell*, 101 F.Supp.2d 588, 657 (6th Cir. 2000) (holding that reliance on *Brown* without more, did not present a Federal constitutional claim). Therefore, summary judgment is granted on the claim of improper jury instruction.

4. Insufficiency of the Evidence

Petitioner's fifth claim is that the evidence in his case was insufficient to support the jury's verdict and the trial court erred when it refused to enter a motion for judgment of acquittal. (Doc. No. 26 at 12-13.) Petitioner asserts that under *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), no rational trier of fact could have found him guilt [sic] of

first-degree murder beyond a reasonable doubt. (Doc. No. 26 at 10-11.)

Respondents argue that Petitioner's insufficiency claim was determined on the merits by the Tennessee Court of Criminal appeals and barring an incorrect or unreasonable application of Federal law dictated by the United States Supreme Court, Petitioner is not entitled to habeas review of this matter. (Doc. No. 20 at 18-20.)

Petitioner in his reply argues that the Federal court must apply the State's evidentiary rules governing proof of the elements of the crime beyond a reasonable doubt, and that only by doing so can the court determine whether the prosecution proved the offense beyond a reasonable doubt. (Doc. No. 23 at 6-7.) Petitioner in his reply argues in effect, that the State court's ruling has resulted in an unreasonable application of clearly established Federal law or in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. This claim, unsupported by additional evidence will not allow Petitioner to meet his burden under 28 U.S.C. § 2254 or under Rule 56(c) of the Federal Rules of Civil Procedure. Under§ 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed correct." Petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. In this case Petitioner has not provided clear and convincing evidence that the facts at trial were unreasonably determined. The Court also finds that the State court did not incorrectly or unreasonably apply established Federal law as determined by the Supreme Court.

"A defendant claiming 'insufficiency of the evidence bears a very heavy burden.'" *United States v. Vannerson*,

786 F.2d 221, 225 (6th Cir.) (*quoting United States v. Soto*, 716 F.2d 989, 991 (2d Cir.1983)). "[T]he standard of review for claims of insufficient evidence is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Evans*, 883 F.2d 496, 501 (6th Cir.1989) (*quoting Jackson*, 443 U.S. at 319). In making determination as to sufficiency of evidence to support conviction, a reviewing court is to consider the record as a whole, including both direct and circumstantial evidence. *See United States v. King*, 169 F.3d 1035 (6th Cir.1999). Circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt. *See United States v. Beddow*, 957 F.2d 1330 (6th Cir. 1992); *United States v. Stone*, 748 F.2d 361 (6th Cir.1984).

In this case, although the evidence was circumstantial and reasonable jurists could disagree as to the sufficiency of the evidence, this Court cannot say that the Tennessee Court of Criminal Appeals erred when it found that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. The proof of guilt beyond a reasonable doubt in this case depended primarily on the credibility of the testifying witnesses and this Court is not in a position to assess the credibility of trial witnesses. Therefore, viewing the evidence in the light most favorable to the prosecution, this Court agrees with the State court that it is possible that a reasonable jury could have found Petitioner guilty beyond a reasonable doubt. Petitioner has not come forward with sufficient clear and convincing evidence to contradict the finding of sufficient

evidence. Therefore, summary judgment is granted on the question of insufficiency of the evidence.

5. Prosecutorial Misconduct

Petitioner's final claim is that the State withheld exculpatory evidence in the form of witness statements that Petitioner could have used to impeach witnesses and allowed witnesses to testify falsely. (Doc. No. 26 at 13.)

Respondents argue that Petitioner's claim of prosecutorial misconduct was not timely raised in State court and therefore is procedurally defaulted and should be dismissed under Federal exhaustion and procedural default doctrine. (Doc. No. 20 at 10-11.)

Petitioner, in his reply, argues that the ineffective assistance of counsel that he received on each level of his State court proceedings provides the "cause" necessary to excuse the default of this claim and therefore his claim should not be dismissed. (Doc. No. 23 at 1-4.)

Petitioner has not raised this claim in a timely fashion in State court and has procedurally defaulted this claim. The Court of Criminal Appeals affirmed the summary dismissal of Petitioner's prosecutorial misconduct claim, making a plain statement that its decision rested on State procedural grounds. Although Petitioner claims that the ineffective assistance of counsel that he has received through out his legal proceedings is "cause" for his procedural default, this Court finds that Petitioner has not demonstrated adequate prejudice on the issue of prosecutorial misconduct to excuse his procedural default. From the record it appears that defense counsel was aware of

the documents in possession of the State from his conversations with the prosecutor and his review of the State's file. The State is required to give notice to the defendant of the exculpatory statements in its possession, and provide defendant with access to these documents, it is not required to do more. Therefore, summary judgment is granted on the question of prosecutorial misconduct.

III. CONCLUSION

The Court GRANTS Respondents' Motion to Dismiss Petitioner's claim of prosecutorial misconduct, DENIES Respondents' Motion to Dismiss portions of Petitioner's ineffective assistance of counsel claim for procedural default, and GRANTS Respondents' Motion for Summary Judgment. Accordingly, Petitioner's Amended Petition for a Writ of Habeas Corpus is DENIED.

An Order consistent with this Memorandum is filed contemporaneously.

It is so ORDERED.

Entered this the 24th day of October, 2000.

/s/ John T. Nixon
JOHN T. NIXON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER 1995 SESSION

JESSIE LAFRANTZ JACKSON, Appellant, VS. **STATE OF TENNESSEE,** Appellee.	**C.C.A. NO. 01-C-01-9412-CR-00427** **DAVIDSON COUNTY** **HON. ANN LACY JOHNS, JUDGE** (Post-Conviction)

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OPINION FILED: DEC 19 1995

AFFIRMED

JOHN H. PEAY,
Judge

OPINION

At his trial, the defendant was convicted by a jury of first-degree murder and sentenced to life imprisonment. He was found not guilty of a second charge of receiving stolen property. The defendant timely filed a notice of appeal which he later dismissed. He then filed a petition for post-conviction relief which was denied after a hearing. He is appealing from that decision and alleging that the lower court erred in three respects:

1. by denying his claim of ineffective assistance of counsel;

2. by finding that there was sufficient evidence of premeditation and deliberation to support his conviction of first-degree murder; and

3. by refusing to reopen the proof to hear evidence from a witness not present at the defendant's trial.

We find that the lower court did not err as claimed by the defendant and affirm the denial of the defendant's petition for post-conviction relief.

FACTS

On February 2, 1986, Sharon Bryant and her boyfriend, the victim James Crawley, hosted a party at the apartment they shared at the University Court housing project in Nashville, Tennessee. The purpose of the party was to raise money via a card game called "Tonk." The victim needed the money for car repairs. Numerous people had been invited to the party, including the defendant, who was a friend of the victim.

The party was already in progress when the defendant arrived with the victim at some time between 9:00 and 10:45 p.m. After arriving, the defendant alternated between playing cards and going upstairs with the victim. Ms. Bryant testified that she had heard arguing the last time the defendant was upstairs with the victim, and that she had told them to come back downstairs. When they did, the defendant resumed playing cards. Bryant also testified that the defendant and the victim had both been "high." The defendant denied that he had been arguing with the victim.

After the defendant had resumed playing cards, three more male guests arrived and wanted to play dice. The victim then left, telling Bryant that he was going to get some dice. He also told her, "I have the money to get my car fixed," and patted one of his pockets. The defendant testified that the real reason the victim left was to sell some cocaine. Bryant testified that if the victim had had the money, it had come from some source other than the card game.[1] Shortly thereafter, the defendant asked Bryant where the victim had gone. She told him that he had gone to get some dice. The defendant then left, leaving some money on the card table. A few minutes later, the victim's cousin came by and told Bryant that her boyfriend had been shot.

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[1] After the victim had been taken to the hospital, his clothing was searched and twenty-five dollars ($25) cash was found. Bryant testified that the victim had needed one hundred dollars ($100) for the car repairs.

The victim's body was lying in front of a long, rectangular apartment building in University Court. The building was located on a corner, with its long side facing one street and running parallel with it ("A Street"), and running perpendicular to the intersecting street ("B Street").[2] The victim had been shot in front of the far end of the building, looking down A Street from the corner. This building was several buildings away from the one in which Bryant's apartment was located. There was testimony that the area where the victim was shot was known for quick and numerous drug transactions. There was a streetlight nearby.

Bryant testified that on arriving at the place where her boyfriend was lying, she had seen the victim's aunt, Freddie Davis, Jonathan Hughes and "another guy" there. Then numerous other people arrived. She testified that the defendant had arrived at about the same time as the ambulance. At that point, she testified, the defendant had tried to comfort her. She further testified that she had spoken with the defendant after she got back from the hospital and that he had mumbled something that she had thought was, "I didn't mean to do it." She testified that when she had questioned him about this, he said, "They didn't have to do it. They didn't have to kill him. He was too little to get shot. They could have beat him up." She testified that she had then asked him who did it, and he had replied, "They said, Frankenberry did it" and "you know they got into an argument," to which she had

[2] The actual names of the streets were not discernable from the record. These arbitrary names are designated in an effort to lend clarity to the description of the murder scene.

replied, "I heard." Bryant also testified that later in the evening she had asked the defendant if the victim had been killed over drugs or money and that he had replied, "No, [it] wasn't about drugs and it wasn't about any money." She had then asked what it was about and he replied, "I'm too upset. I can't talk. I'll come back tomorrow and tell you." Bryant testified that the defendant had not later explained why the victim had been shot, but did deny shooting him.

Jonathan Hughes testified that he had been sitting on a car parked along B Street when he saw the victim walking down the sidewalk. Hughes testified that the defendant had been walking down the street behind the victim, telling him to "Come here and let me holler at you for a minute." Hughes testified that the victim had responded that he didn't have time, he was looking for his money. According to Hughes, the defendant had continued to follow the victim. Paul Ray Jones, Hughes' cousin, testified that he had been with Hughes and had also seen the defendant and the victim walking down the street.

Hughes testified that Jones had then told him that his girlfriend, Melissa Gooch, wanted to talk to him. At this, Hughes had started down B Street to meet his girlfriend, walking on the opposite sidewalk and somewhat behind the victim and the defendant, but going in the same direction. A short distance later, where B Street intersected A Street, Hughes testified that he and his girlfriend had turned left while the defendant and the victim turned right. He further testified that he and Gooch had then heard two shots, at which they had turned around, looked up A Street, and saw the defendant fire two shots at the victim. Hughes testified that he had then seen the defendant bend down, roll the victim over, and run around the

far corner of the building. Hughes testified that he had then gone to where the victim was lying, arriving there after ten or fifteen others had.

Two other witnesses testified that they had seen the defendant running at some distance from the body, but in a direction away from the body, and that he had been trying to hide his face behind his jacket. These sightings were immediately after the shooting, at about 12:30 a.m. The defendant denied taking any such actions.

Melissa Gooch was not called to testify by either the defendant or the State.

The defendant denied shooting the victim. He testified that he and the victim had not had an argument that night and that the victim was trying to sell some cocaine. He testified that he had brought a small amount of cocaine to the party as a gift to the host and hostess, but that the victim had wanted to add it to some cocaine he already had and sell the entire amount to a third party. The defendant testified that he had been agreeable to this so long as the victim repaid him a previous ten dollar ($10) loan out of the proceeds. The victim was reluctant to do this because he needed the money for his car.

The defendant testified that he had left the party because two of the three newcomers had "appeared to be gangster[s]," so he had gone to his pickup truck to get his pistol for protection.[3] On the way back to the apartment from his truck, the defendant testified, he had met the

[3] The pistol that the defendant had and which was recovered by the police during a consensual search was not the murder weapon.

same three men who then told him that the victim had been shot. At that point, the defendant testified, he had walked down to the murder scene, hiding his pistol under a fence on the way. The defendant denied that he had been on the street where Hughes claimed to have seen him.

Freddie Davis testified that he had been walking from his mother's apartment to his sister's apartment when he saw the victim and someone else he couldn't identify walk up to a brown and beige car on A Street. Davis testified that "they was talking for a minute and then the next thing I know the dude just come out of his car and just started shooting." Davis testified that he had then run to his sister's apartment to tell her, and had then gone down to where the victim was lying. The angle of Mr. Davis' view was approximately perpendicular to that of Hughes but, from a review of the exhibits, the jury could reasonably have concluded that the distance of each witness from the scene of the shooting was roughly about the same. Davis testified that the car had taken off and that he was with the victim when he died. Davis also testified that "everybody [had been] saying that Frankenberry had shot" the victim. Davis reported this information to the police, who then put a "pick-up" out on the vehicle. Detective Wynn testified that they had investigated a car that matched the description given and had tried to develop information on a Frankenberry, but that they had not come up with any other indication that Frankenberry had been involved, and had not tied the vehicle to the crime.

Davis also testified that he had not seen Jonathan Hughes at the scene and that the other person who had been with the victim when he was shot had run off. Davis testified that this person had been wearing blue jeans and a gray jacket. The defendant had been wearing red pants

on the night in question. Davis admitted on cross-examination that he had drunk two to four half-pints that night prior to the shooting.

The victim had been shot with a .25 caliber gun and three .25 caliber bullets were recovered from his body. The murder weapon was never found. However, John Crawford testified that he had seen the defendant pull a pistol out from under a car seat nine to ten months before the shooting and that, although he could only see a portion of the pistol because the defendant had had it "cuffed up," he thought it was a .25 caliber pistol. Terry Merrill testified that, after the shooting, he had seen the defendant retrieve a gun from under a fence between two buildings and put it in his pants. The defendant testified that this had been the .22 caliber pistol that he had hidden after learning of the victim's death. The defendant testified that he had never had a .25 caliber gun.

PROCEDURAL HISTORY

The jury trial of this matter began on Wednesday, March 11, 1987, before the Hon. A.A. Birch. On Monday, March 16, 1987, the jury pronounced the defendant guilty of murder in the first degree. The defendant was sentenced to life imprisonment. The jury found the defendant not guilty of the second charge of concealing stolen property.

On April 15, 1987, the defendant's new counsel filed a motion for new trial alleging that "the evidence introduced at the trial is insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt." This motion for new trial was overruled after a hearing.

The defendant next filed his Notice of Appeal on August 25, 1987. This appeal was dismissed in May 1988 "at the request of the [defendant] and his counsel."

On March 29, 1989, the defendant filed his Petition for Post Conviction Relief, claiming ineffective assistance of counsel. The Hon. Ann Lacy Johns was designated to hear the post-conviction petition.

On July 26, 1990, Judge Johns heard a portion of the proof concerning the defendant's ineffective assistance of counsel claim. Specifically, the defendant's trial counsel, Doug Love, testified about his representation of the defendant in preparation for and at trial. The evidentiary hearing was then continued to a later date.

On February 19, 1991, the defendant filed an "Amendment to Petition for Post Conviction Relief." The stated purpose of this amendment was to "clarify and amplify upon the contention that ineffective assistance of counsel was provided." No additional grounds for relief were asserted.

On May 30, 1991, the lower court heard additional evidence on the post-conviction petition and then took the petition under advisement.[4]

On January 26, 1993, approximately one and one-half years later, but before the lower court had issued its order

[4] The record contains minutes indicating that the defendant's post-conviction petition was dismissed by the lower court on February 28, 1991, apparently because of the defendant's counsel's failure to appear. However, the lower court subsequently heard additional proof in the continued evidentiary hearing and later issued an order denying relief.

denying the defendant's petition, the defendant filed his Amended Petition for Post Conviction Relief. In this pleading, the defendant added as a ground for relief that his conviction was "unconstitutional and otherwise . . . void under state law" because the State had failed to carry its burden of proving both premeditation and deliberation sufficient to support a finding of first-degree murder. Accordingly, the defendant alleged, his conviction must be reduced to second-degree murder. The defendant also alleged in this pleading that the jury instructions regarding the elements of premeditation and deliberation were constitutionally infirm. The State opposed the defendant's Amended Petition on the merits.

On July 28, 1994, the lower court entered an order denying post-conviction relief. With respect to the defendant's claim of insufficient evidence of premeditation and deliberation, the order states, "this Court's review of the evidence presented at trial fully supports the jury's finding of premeditation and deliberation." The lower court further found that the jury instructions were "a correct recitation of the law as it existed at the time of Petitioner's trial." As to the defendant's claim of ineffective assistance of counsel, the lower court found "as a matter of law that any arguable deficiency on the part of Mr. Love would not have resulted in a different outcome in this case [sic]. The Court affirmatively finds that Petitioner was well represented by Mr. Love, who[se] services were within the range of competence demanded of attorneys in criminal cases." Accordingly, the lower court denied the defendant's petition.

On August 8, 1994, the defendant filed his Notice of Appeal with regard to the lower court's denial of his Petition for Post Conviction Relief. On the same date, he

filed a "Motion for Hearing in Nature of Motion for New Trial," alleging newly discovered evidence requiring an evidentiary hearing and a reopening of the proof. The newly discovered evidence consisted of Melissa Gooch, described in this pleading as a "missing" witness. No affidavit from this witness was filed. The lower court summarily denied this motion on August 15, 1994.

We first address the defendant's contention that the lower court erred by refusing to reopen the proof to allow testimony by a witness not present at the defendant's trial.

In support of his effort to reopen the proof in this matter more than seven years after the jury verdict was delivered, the defendant filed a pleading styled "Motion for Hearing in Nature of Motion for New Trial." In this motion, the defendant claimed that a "missing witness, Melissa Gooch, [who] has only recently been found in this case" would testify that, contrary to Hughes' testimony, she was not with him on the night the victim was shot. No affidavit was filed in support of this motion. Hughes had testified as to this witness' name at the defendant's trial.

Not surprisingly, the defendant cites no authority supporting the efficacy of such a novel pleading. The defendant did timely file a motion for new trial, which was denied after a hearing. The defendant does not get two bites at this particular apple.

Construing the pleading as a writ of error *coram nobis* does not assist the defendant, either. First, it is not timely filed. T.C.A. § 27-7-103 provides "[t]he writ of error coram nobis may be had within one (1) year after the judgment becomes final." The defendant's pleading was filed more than seven years after his conviction and more than six years after he dismissed his appeal. Moreover, even if the

filing were timely, the defendant has failed to satisfy the requirements of the writ:

> A petition for the writ of error *coram nobis* in a criminal case, which seeks relief on the ground of subsequently or newly discovered evidence, should recite: (a) the grounds and the nature of the newly discovered evidence, (b) why the admissibility of the newly discovered evidence may have resulted in a different judgment if the evidence had been admitted at the previous trial, (c) the petitioner "was without fault in failing to present" the newly discovered evidence at the appropriate time, and (d) the relief sought by the petitioner. *Affidavits should be filed in support of the petition either as exhibits or attachments to the petition or at some point in time prior to the hearing.*

Teague v. State, 772 S.W.2d 915, 921 (Tenn. Crim. App. 1988) (citations omitted) (emphasis added). No affidavit from Melissa Gooch was ever filed in this matter. Moreover, there is no satisfactory reason given for the defendant's failure to locate this witness years ago. Nor is there an adequate explanation of why Ms. Gooch's testimony may have resulted in an acquittal. Since all the defendant tells us about Gooch is that she denies having been with Hughes at the time of the shooting, she is in no position to contradict what he claims to have seen. Her proposed testimony would serve merely to impeach Hughes' memory about having seen her that night. This type of rebuttal evidence does not lead to the conclusion that the jury would have decided the case differently had it heard Gooch testify. Finally, "[t]he decision to grant or deny a petition for the writ of error *coram nobis* on the ground of subsequently or newly discovered evidence rests within the

sound discretion of the trial court." *Teague,* 772 S.W.2d at 921. Even if the pleading is properly considered a writ of error *coram nobis,* there has been no abuse of discretion shown.

The defendant argues that, notwithstanding his failure to conform to any of the relevant procedural requirements for setting aside the jury's verdict on the basis of newly discovered evidence, due process entitles him to a new trial. What the defendant apparently fails to recognize is that "[t]he fundamental requirement of due process is the *opportunity* to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) (citation omitted) (emphasis added). This defendant has had no less than two opportunities to be heard on this matter: his motion for a new trial and his petition for post-conviction relief which included two amendments and evidence heard on two occasions. The defendant will not now be heard to complain that he has not had the *opportunity* to be heard on the issue of newly discovered evidence, particularly when the "missing" witness' name was adduced at trial. We find this issue to be without merit.

We next address the defendant's complaint that there was insufficient evidence of the elements of premeditation and deliberation to convict him of first-degree murder, and that his conviction should therefore be reduced to second-degree murder. The State argues that the defendant has waived this objection because he did not pursue it in his direct appeal. The defendant argues that the State cannot assert waiver against him because the State did not argue waiver in opposition to the defendant's amended petition and is therefore precluded from doing so now.

When the defendant sought to amend his post-conviction petition so as to raise the sufficiency of the evidence and jury instruction issues, the State argued against the amendment on the merits. The State did not then allege that the defendant had waived these issues when he dismissed his direct appeal. Rather, the State is now raising this waiver argument for the first time on appeal. Because the post-conviction court did not have the opportunity to determine this waiver issue, this Court is precluded from considering it. *See, e.g., Lawrence v. Stanford,* 655 S.W.2d 927, 929 (Tenn. 1983) ("It has long been the general rule that questions not raised in the trial court will not be entertained on appeal. . . .")

Given that the State's waiver argument is ineffective for the purposes of this appeal, it is appropriate to consider the defendant's insufficiency of evidence argument in this post-conviction proceeding. *Slate v. State,* No. 03C01-9201-CR-00014, Sevier County (Tenn. Crim. App. filed April 27, 1994, at Knoxville) ("a conviction based upon insufficient evidence violates due process, is constitutionally void and may be attacked in a post-conviction proceeding unless it has been waived or previously determined." Slip op. at 11).

When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences

which may be drawn therefrom. *State v. Cabbage,* 571 S.W.2d 832, 835 (Tenn. 1978).

To support a conviction for first-degree murder, the State must prove the elements of premeditation and deliberation beyond a reasonable doubt. *State v. Brown,* 836 S.W.2d 530 (Tenn. 1992). These two elements are different and each must be supported by adequate proof. *Id.* While thoroughly analyzing these two elements, our Supreme Court has said:

> It is not easy to give a meaningful definition of the words 'premeditate' and 'deliberate' as they are used in connection with first-degree murder. Perhaps the best that can be said of 'deliberation' is that it requires a cool mind that is capable of reflection, and of 'premeditation' that it requires that the one with the cool mind did in fact reflect, at least for a short period of time before his act of killing.

Brown, 836 S.W.2d at 541 (quoting 2 W. LaFave and A. Scott, *Substantive Criminal Law* § 7.7 (1986) with approval). Proof of these two elements may be established by circumstantial evidence.

The State adduced testimony at trial that a short time before the victim was shot, he had had an argument with the defendant; that the defendant had brought some cocaine to the party with the intent of supplying it to the victim; that the victim owed the defendant some money; that the victim was reluctant to repay this money on the night he was shot; that some period of time passed between the argument and the shooting during which the defendant resumed playing a card game; and that the defendant followed the victim for some distance and had further conversation with the victim before the shooting

occurred. The jury could have reasonably and legitimately inferred from this evidence that the defendant, after arguing with the victim and realizing that his debt was not going to be paid that night, developed the intent to kill the victim. The jury could also have reasonably and legitimately inferred from the defendant's conduct in returning to the card game, following the victim and attempting to speak with him again, that any passion ignited during the argument had cooled off, that the defendant had had a "cool mind" that was capable of reflecting on his intent to kill the victim, and that the defendant did in fact reflect prior to shooting the victim. There was no evidence adduced at trial that the defendant and the victim were arguing or fighting immediately prior to the shooting.

The evidence in this case was sufficient to establish the elements of premeditation and deliberation necessary to the conviction of first-degree murder. This issue is without merit.

In conjunction with his argument that there was insufficient evidence of premeditation and deliberation, the defendant complains that the trial court's jury instruction on these elements was constitutionally infirm. In support of his position, the defendant relies on our Supreme Court's conclusion that it would be "prudent to abandon an instruction that tells the jury that 'premeditation may be formed in an instant.'" *Brown,* 836 S.W.2d at 543. Because the jury charge in the defendant's trial contained this language, he argues that the jury was disabled from properly determining that he possessed the requisite state of mind.

As this Court has repeatedly held, *Brown* did not announce a new constitutional principle requiring retroactive application of the preferred jury instruction. *See, e.g., Lofton v. State,* 898 S.W.2d 246, 250 (Tenn. Crim. App. 1994). Accordingly, we agree with the lower court that the jury instruction given in this case was "a correct recitation of the law as it existed at the time of Petitioner's trial," and that the defendant is not thereby entitled to have his conviction reduced to second degree murder. This issue is without merit.

Finally, we will address the defendant's contention that he was denied effective assistance of counsel at his trial. Specifically, the defendant alleges that his trial counsel was ineffective because he failed to interview several witnesses prior to the trial; he waived the defendant's preliminary hearing; he failed to file a request for discovery and inspection; he failed to discover one of the investigating officer's reports containing information about another suspect; he made no request for *Jencks* material after the State's witnesses testified; he failed to properly prepare the defendant for his testimony; and he conducted ineffective cross-examinations at trial.

The lower court conducted a bifurcated evidentiary hearing on the defendant's claim on two different days separated by approximately ten months. On the first day, the State offered the testimony of Mr. Douglas Love, the defendant's trial counsel. On the subsequent hearing day, the defendant offered testimony from Mr. Love; Detective Terry McElroy; Jonathan Hughes; Sharon Bryant; Ethel Robertson; and himself.

Mr. Love testified that he had been licensed to practice in the State of Tennessee in 1979 and that he had

been practicing primarily criminal law in this state since that time. The defendant hired Mr. Love to represent him in the trial of this matter. Mr. Love testified that he had met with the defendant in his office "at least a half a dozen" times, discussing matters for fifteen to thirty minutes on each occasion. Mr. Love also went out with the defendant to University Court at least twice where Mr. Love viewed the relevant area and drew two diagrams. The defendant told Mr. Love the names of several witnesses, which Mr. Love wrote down, including Freddie Davis and Sharon Bryant. Although the record is clear that Mr. Love spoke with Davis prior to the trial, it is unclear whether he spoke with Bryant. Mr. Love also testified that he and the defendant had discussed the defendant's own testimony and the nature of anticipated cross-examination, although they did not go through a "formal rehearsal." Mr. Love testified that he had felt adequately prepared when they went to trial.

Mr. Love explained that he had not filed a request for discovery and inspection because he had discussed the case with the State's attorney at least twice and had had an opportunity to review the State's file which, apparently, contained transcripts of the statements made to the police by Hughes, Bryant, Mark Crawford and Bryant's sister. Although he admitted that he had not spoken with Hughes prior to the trial, he testified that he felt that he had gotten what information he needed about Hughes' anticipated testimony from the State.

Although Mr. Love could not remember specifically why the preliminary hearing was not had in this matter, he testified that he assumed it had been waived to get a favorable bond reduction, and that he thought there were ways other than a preliminary hearing to "get the

information necessary to try a case." There is no proof in the record that Mr. Love would have obtained information at the preliminary hearing that he could have used to the defendant's advantage at trial.

To succeed on a claim of ineffective assistance of counsel, the defendant must prove two things: first, that his lawyer's performance was deficient and second, that his lawyer's deficient performance adversely affected the defense. That is, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington,* 466 U.S. 697, 694, 104 (1984).

In a post-conviction proceeding, the defendant has the burden of proving his allegations by a preponderance of the evidence. On appeal of a post-conviction petition, the trial court's findings are conclusive and will not be disturbed unless the evidence in the record preponderates against them. *Taylor v. State,* 875 S.W.2d 684 (Tenn. Crim. App. 1993). In the lower court's order denying the defendant's petition for post-conviction relief, the court "accredit[ed] the testimony of Mr. Love that he was adequately prepared for trial and that he fully investigated the matter prior to trial" and that "[the curing of] any arguable deficiency on the part of Mr. Love would not have resulted in a different outcome in this case."

The main thrust of the defendant's complaints about his trial counsel is that Mr. Love did not adequately investigate the case prior to trial. The defendant's argument appears to be that, had Mr. Love interviewed all of the potential witnesses prior to trial, he would have either

discovered (1) how to destroy Hughes' credibiiity and/or (2) the real killer. However, there was not a shred of evidence introduced on either day of the bifurcated post-petition hearing that, had he interviewed Hughes prior to the trial, Mr. Love would have discovered information that he could have used effectively against Hughes at the trial. The only impeachment "evidence" ever attempted to be put before the lower court came in the form of an unsubstantiated pleading filed *after* the court had already ruled on the defendant's petition. This pleading stated only that Melissa Gooch, the woman that Hughes testified had been with him at the time of the shooting, denied having been with Hughes at the time. Although such testimony might have affected Hughes' credibility in some minimum way, it in no way rises to the level of contradicting what Hughes claims to have seen. On the basis of the record before this Court, it is asking too much that we draw the inference that the jury would not have believed Hughes at all had Melissa Gooch testified. "It is elementary that neither a trial judge nor an appellate court can speculate or guess on the question of whether further investigation would have revealed a material witness or what a witness's testimony might have been if introduced by defense counsel." *Black v. State,* 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990).

Even if, *arguendo,* Mr. Love was negligent in failing to interview Hughes and Gooch prior to trial, the defendant has not carried his burden of proving that this "negligence" prejudiced him.

> [I]f a petitioner is able to establish that defense counsel was deficient in the investigation of the facts or calling a known witness, the petitioner is not entitled to relief from his conviction on this ground unless he can produce a material witness who (a) could have been found by a reasonable investigation *and* (b) would have testified favorably in support of his defense if called. Otherwise, the petitioner fails to establish the prejudice requirement mandated by *Strickland v. Washington.*

Black, 794 S.W.2d at 757-58 (footnote omitted) (emphasis added). Melissa Gooch was never effectively produced, nor has there been any showing on the record of favorable testimony that would have been elicited had Mr. Love been more diligent.[5] *See also Cone v. State,* 747 S.W.2d 353, 356 (Tenn. Crim. App. 1987) (Where there was no showing that the State's witness would have testified differently had the defendant's lawyer talked with her before trial or that his failure to interview her prejudiced the defendant in any way, there was no ineffective assistance of counsel.)

Simply put, the case against the defendant hinged on whether the jury chose to believe Hughes' account of who shot the victim (which was bolstered by two witnesses who claimed to have seen the defendant running from the scene), or the defendant's and Davis' accounts. Mr. Love was effective in presenting the defendant and Davis' version of the facts surrounding the shooting. In order to have presented a more effective defense, Mr. Love would have had to have countered Hughes' testimony through either effective impeachment or through introduction of additional proof that there was a more likely suspect. As set forth above, there is no cognizable proof in the record of any impeaching material. As to the more likely suspect, the investigating

[5] This is not to imply that Mr. Love *should* have been more diligent.

officers testified that they had been unable to tie either the described vehicle or Mr. Wayne "Frankenberry" Curry to the crime. When the police failed to apprehend another suspect, it did not become Mr. Love's responsibility to do so.

With respect to the defendant's claim that Mr. Love did a poor job of cross-examining the State's witnesses, "there has been absolutely no evidence introduced that the petitioner was prejudiced by inadequate cross-examination, and cross-examination is a strategic and tactical decision of trial counsel, which is not to be measured by hindsight." *State v. Kerley,* 820 S.W.2d 753, 756 (Tenn. Crim. App. 1991). The defendant has not proved ineffective assistance of counsel on this basis.

In summary, even if the defendant has shown that his trial counsel made errors both before and during his trial in satisfaction of the first prong of the *Strickland* test, he has failed to carry his burden of proving that the outcome of the trial would probably have been different but for those errors. Thus, we find that the defendant's ineffective assistance of counsel claim is without merit, and affirm the decision of the lower court.

/s/ John H. Peay
JOHN H. PEAY, Judge

CONCUR:

/s/ Paul G. Summers
PAUL G. SUMMERS, Judge

/s/ David H. Welles
DAVID H. WELLES, Judge

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
SEPTEMBER SESSION, 1998

JESSIE LAFRANTZ JACKSON, Appellant, **V.** **STATE OF TENNESSEE,** Appellee.	))))))	**C.C.A. NO. 01C01-9711-CR-00523** **DAVIDSON COUNTY** **HON. J. RANDALL WYATT, JR. JUDGE** **(POST-CONVICTION)**

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OPINION FILED OCT 19 1998

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

The Petitioner, Jessie LaFrantz Jackson, appeals the order of the Davidson County Criminal Court dismissing his *pro se* petition for post-conviction relief. In this appeal, Petitioner raises the following three issues: (1) whether the State obtained the first degree murder conviction through the perjured testimony of the key eyewitness; (2) whether the State failed to produce certain exculpatory information; and (3) whether his post-conviction counsel was ineffective for failing to offer impeachment and exculpatory evidence at the first post-conviction hearing. We affirm the trial court's denial of post-conviction relief.

On March 16, 1987, Petitioner was convicted for first degree murder and sentenced to life imprisonment. On August 25, 1987, Petitioner filed a notice of appeal, but the appeal was dismissed in May of 1988 at the request of Petitioner and his counsel. On March 29, 1989, Petitioner filed his first petition for post-conviction relief, claiming ineffective assistance of counsel. The evidentiary hearing on the petition was held on various dates beginning in July 1990. The trial court denied relief on July 28, 1994. On December 19, 1995, this Court affirmed the dismissal. On June 10, 1996, our supreme court denied Petitioner's application for permission to appeal. On March 31, 1997, Petitioner filed a second petition seeking post-conviction relief. On May 28, 1997, the trial court summarily dismissed the petition from which Petitioner now appeals.

We will not address Petitioner's issues on the merits as we conclude that his petition for post-conviction relief is time-barred by the statute of limitations. At the time Petitioner's convictions became final, the statute of limitations applicable to post-conviction proceedings was three

years. Tenn. Code Ann. § 40-30-102 (repealed 1995). His conviction became final in May 1988 when he withdrew his direct appeal for the murder conviction. He therefore needed to file his petition by May 1991 in order to toll the running of the statute. However, Petitioner did not file this petition for post-conviction relief until March 31, 1997, thus barring any claims he might have had.

The new 1995 Post-Conviction Act governs this petition and all petitions filed after May 10, 1995. Petitioner's petition is not revived by the new Post-Conviction Procedure Act. *See* Tenn. Code Ann. § 40-30-201 *et seq.* Petitioners "for whom the statute of limitations expired prior to the effective date of the new Act, i.e., May 10, 1995, do not have an additional year in which to file petitions for post-conviction relief." *Carter v. State*, 952 S.W.2d 417, 418 (Tenn. 1997). Also, Petitioner's claims do not fall into any of the three recognized exceptions to the new Act in which a trial court can have jurisdiction to consider a petition filed outside the statute of limitations. *See* Tenn. Code ann. § 40-30-202(b). Furthermore, pursuant to Tenn. Code Ann. § 40-30-202(c), a Petitioner may only file one post-conviction petition attacking a single judgment. However, a petitioner may file a motion in the trial court to reopen a previously filed post-conviction petition in four limited circumstances. *See* Tenn. Code Ann. § 40-30-217(a). After a careful review of the record, we find that Petitioner's allegations in the case *sub judice*, even if true, would not support the applicability of any of those circumstances. *See* Tenn. Code Ann. § 40-30-217(a).

Based on the foregoing, we conclude that the trial court's summary dismissal of the petition was appropriate. Tenn. Code Ann. § 40-30-206(b).

/s/ Thomas T. Woodall
THOMAS T. WOODALL,
Judge

CONCUR:

/s/ Gary R. Wade
GARY R. WADE, Presiding Judge

/s/ J. Curwood Witt, Jr.
J. CURWOOD WITT, JR., Judge

No. 01-5720

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JESSIE L. JACKSON, Petitioner-Appellant, v. FLORA HOLLAND, WARDEN Respondent-Appellee.	)	ORDER (Filed Nov. 21, 2003)

BEFORE: MERRITT and DAUGHTREY, Circuit Judges; and RUSSELL,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

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* Hon. Thomas B. Russell, United States District Judge for the Western District of Kentucky, sitting by designation.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

JESSIE LAFRANTZ JACKSON, Petitioner,	)	
v.	)	No. 3:97-0444
STATE OF TENNESSEE AND FLORA HOLLAND, WARDEN,	)	Judge Nixon
Respondents.	)	

NOTICE OF FILING

(Filed Dec. 13, 1999)

Petitioner gives notice of the filing of the following documents for use in the above-styled case:

ADDENDUM NO. 1:	The statement of Probable Cause to arrest Jesse Jackson given by Detective Mark A. Wynn from the Metropolitan Police Department.
ADDENDUM NO. 2:	The statement of Jonathan Hughes given to the Metropolitan Police Department on February 5, 1986.
ADDENDUM NO. 3:	The statement of Jonathan Hughes given to the Metropolitan Police Department on February 7, 1986.
ADDENDUM NO. 4:	The statement of Mark Crawford given to the Metropolitan Police Department on February 5, 1986.

ADDENDUM NO. 5:	The investigatory report of Detective Terry McElroy of the Metropolitan Police Department dated February 2, 1986.
ADDENDUM NO. 6:	The investigatory report of Officer C. Brandon of the Metropolitan Police Department dated February 2, 1986.
ADDENDUM NO. 7:	The investigatory report of Officer Mark Wynn of the Metropolitan Police Department dated February 3, 1986.
ADDENDUM NO. 8:	The investigatory report of Officer Mark Wynn of the Metropolitan Police Department dated February 27, 1986 wherein he obtained the statement of Paul Ray Jones.
ADDENDUM NO. 9:	The investigatory report of Officer Mark Wynn of the Metropolitan Police Department dated February 25 and 26, 1986.
ADDENDUM NO. 10:	The investigatory report of Officer Mark Wynn of the Metropolitan Police Department dated February 4, 1986.
ADDENDUM NO. 11:	The investigatory report of Officer Mark Wynn of the Metropolitan Police Department dated February 5, 1986.
ADDENDUM NO. 12:	The sworn statement of Melissa Gooch, dated June 15, 1994.

Respectfully submitted,

/s/ Caryll S. Alpert
CARYLL S. ALPERT
Assistant Federal Public Defender
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Nashville, TN 37203
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Attorney for Jesse Jackson

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served by first-class mail, postage prepaid, upon Lisa A. Naylor, Assistant Attorney General, Cordell Hull Building, Second Floor, Criminal Justice Division, 425 Fifth Avenue North, Nashville, Tennessee 37243-0493 on this the 13th day of December, 1999.

/s/ Caryll S. Alpert
CARYLL S. ALPERT

Opposition Brief Unavailable for Filming at This Time